

SOUTH AFRICA / JUDGMENT

N v D (2011/3726) [2016] ZAGPJHC 163 (15 June 2016) [2016] ZAGPJHC 163

COURT

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

2011/3726

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 2011/3726

DATE: 15 JUNE 2016

In the matter

between:

E

X

N Plaintiff

And

S

R

D Defendant

JUDGMENT

LAMONT, J:

- [1] The plaintiff instituted action against the defendant seeking a decree of divorce and ancillary relief. The issues were separated and the only issues which came before me were whether or not the defendant had consented to be married and whether or not the ceremony conducted complied with the requirements to conclude a customary marriage.
- [2] Both parties had previously been married and divorced. The plaintiff is the mother of a child born of the previous marriage. The defendant is the father of two children born of the previous marriage.
- [3] The parties' previous marriages were by civil law.
- [4] During late 1994 the parties met each other. They lived together for a period of time. At that time the plaintiff was a senior manager for the Johannesburg City Theatre. The defendant was a director at Eskom. The parties stayed together for a number of years. They separated and lived apart but continued their relationship until it "fizzled out". After some time, the relationship was renewed.
- [5] The defendant approached the plaintiff and stated that he wished to form a new relationship with her. They went to Dubai where the defendant proposed marriage to the plaintiff. She accepted but put a number of conditions in place which governed that acceptance. They were:
 - 5.1 the defendant apologise to the plaintiff's mother,
 - 5.2 the parties and their children attend therapy sessions,
 - 5.3 the defendant to go to the plaintiff's home for lobola negotiations,
 - 5.4 the parties conclude a civil marriage.
- [6] The defendant gave the plaintiff an engagement ring and agreed to the conditions the plaintiff set out. The ring which the defendant gave to the plaintiff and which was to signify their engagement was worn in Dubai for a while. The ring was kept by the defendant pending the implementation of everything which had been agreed. The plaintiff did not wear the ring in South Africa
- [7] The parties attended the therapy and the defendant resolved the outstanding issues with the plaintiff's mother. The only remaining outstanding issues were the question of the traditional lobola negotiations and the civil marriage. The lobola negotiations were arranged to take place on 16 March 2003. A wedding venue where a function was to take place was arranged for November 2003. According to the plaintiff that function involved only the blessing of the rings, according to the defendant the function was to perform a civil marriage.

- [8] The events surrounding the lobola negotiations are largely common cause. The parties had in Dubai agreed approximately what the lobola would be. Each family sent a delegation of three members to the house of the plaintiff's mother on 16 March 2003. The practices surrounding lobola negotiations were followed. The plaintiff and defendant were not permitted to be present when negotiations took place between the delegates who had been mandated. Eventually the delegates reached agreement. There was a ceremonial placing of blankets and a scarf on certain of the women. The lobola was paid in full and there was a celebration.
- [9] The first issue between the parties was not whether or not the lobola negotiations had taken place in accordance with what was required by custom. It concerned what the effect of those lobola negotiations was. The plaintiff's evidence was that once lobola negotiations had been concluded a customary marriage occurred. Her evidence was that the parties knew that reference to lobola negotiations was reference to a marriage as that is what the customary law is. Her evidence was that the defendant had agreed to the marriage and had participated in the ceremony. Hence he had consented to be and was married.
- [10] The defendant's evidence was that lobola negotiations form part only of a process of marriage. The marriage process would only be completed according to customary law once the ceremonial handing over and induction of the bride into the grooms' family had taken place, hence he had not consented to be married if the process of 16 March 2003 took place and in any event that ceremony by customary law did not result in a marriage.
- [11] The parties referred throughout to the ceremony which was to take place and which did take place on 16 March 2003 as lobola negotiations, not as a marriage ceremony. The plaintiff understood the reference to lobola negotiations as a reference to a marriage ceremony which would result in the parties being married. The defendant understood the reference to lobola negotiations to be a reference to a part of a marriage ceremony which would not result in the parties being married until the other parts had been concluded. Each of them went to and participated in the ceremony holding their respective belief.
- [12] The parties are required to consent to a customary union by The Recognition of the Customary Marriages Act No 121 of 1998. The Act provides in S(3)
- "Section 3*
- (1) For a 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."

[13] Before dealing with the evidence I must deal with the fact that the plaintiff is an admitted liar and perjurer. She made a number of extra curial statements, some under oath, which conflicted with her present evidence. She on numerous occasions stated after the lobola negotiations had been concluded that she was unmarried, whereas in this court she stated in evidence that she was married. The false statements were made by the plaintiff on each occasion to achieve an advantage that she otherwise could not

achieve. The plaintiff is prepared to distort the truth to achieve a purpose she desires. Her evidence must be approached on this basis.

[14] The plaintiff's evidence was that as a matter of custom the lobola negotiations once successfully concluded result in a marriage. She said that her references to lobola negotiations made to the defendant were references to a marriage by customary union and were understood by the defendant to be such. It was submitted by the plaintiff that the defendant's agreement to lobola negotiations taking place; his compliance with the ceremony provided by custom and the attendance of the representatives of the defendant at the ceremony constituted a consent to that marriage whether or not the defendant had in fact expressly consented to a marriage and mandated his representatives to agree to a marriage.

[15] At the ceremony itself consent was neither sought from the defendant personally nor was it obtained. His consent at best for plaintiff would have been given through the delegates who represented him at the lobola negotiations.

[16] The ceremony itself contains no procedure requiring the defendant or his delegates to state that he consented to be married by customary union. The plaintiff's delegates assumed that defendant consented by his delegates asking for the hand of the bride and identifying her. This assumption is based on their belief that the ceremony constituted marriage proceedings. Even if the response to the question of whether the bride was the person "they had come to marry" was yes that response is ambiguous as the defendant was to marry the plaintiff but not at that ceremony.

[17] The plaintiff relied also on the evidence of one of her delegates to establish the defendant's consent at the lobola negotiations. One of the negotiators who negotiated on behalf of the plaintiff, one Edmund Mathabela stated that when the defendant's representatives came to the lobola negotiations they said they had come for a bride's hand and they wanted the plaintiff to get married. The plaintiff was physically shown to the delegates who were asked whether she was the person that they had come to marry. Their response was that she was such person. He accepted that the defendant's delegates had come for a marriage ceremony and that the defendant consented to be married. He said that there was no question of the delegates

having come to effect an engagement as claimed by the defendant. When he was cross-examined on this issue it became apparent that the delegates had asked for the bride's hand and that he had inferred from that statement that they were saying that they had come to marry. He accepted that

at the previous court hearing he had not said that he had asked whether the bride was the person that they had come to marry. He further agreed under cross-examination that the defendant's lead negotiator had only spoken about lobola. During the celebrations which took place after the payment of lobola and the announcement that the lobola negotiations had been concluded thanks were given in a speech. He assumed these thanks referred to a marriage not just a payment of lobola. There was however on a proper construction of his evidence no statement made by the defendant or the defendant's delegates that the parties were married or was to be married at the ceremony. This is the only evidence led by the plaintiff of what had been said during the lobola negotiations. On this evidence the words uttered by the defendant's delegation did not go as far as a statement that the delegates were mandated by the defendant to conclude a marriage and had on his behalf consented to a marriage. The asking of the bride's hand is ambiguous; it could be for purposes of marriage then and there at the ceremony or later.

[18] An expert witness was called by the plaintiff. His evidence was that once lobola negotiations had been concluded the parties were married according to customary law. Nothing further was required. On his evidence parties who agree to proceed with lobola negotiations and who do so have consented to, intended to and been party to a marriage by custom. This evidence is of course evidence on the basis that the defendant knew the ceremony constituted a marriage and that he consented to it.

[19] The defendant gave evidence that finalization of lobola negotiations would not result in a marriage by custom; that he had neither consented to nor intended to be married by custom in consequence of those proceedings. He believed that the proceedings were but a step in a process of marriage. Hence he had not agreed to neither had he mandated any one of his delegates to agree to a marriage on 16 March 2003.

[20] The defendant's mind-set appears to me to have been governed by two overriding beliefs:

20.1 the custom of lobola negotiations resulted in a step in a process of a marriage being concluded, not in a marriage,

20.2 the plaintiff and he were to be married by a civil marriage ceremony.

[21] In order to find that the defendant consented to a marriage I need to find that his evidence is improbable and untrue, as he denies having consented. The starting point seems to me to consider: -

21.1 whether he knew that the lobola negotiations would result in a marriage, if he did not it would be a probability in his favour;

21.2 whether he authorised the delegation representing him at the lobola negotiations to conclude a marriage, if he did not his conduct prior to the marriage was consonant with an intention not to participate in a ceremony resulting in marriage and not to consent to marriage.

- [22] The defendant's evidence was that his understanding of the law was that lobola negotiations did not result in a marriage. He did not intend to marry by concluding the lobola negotiations. He would become married once the civil marriage had been concluded and after the conclusion of an appropriate ante-nuptial contract.
- [23] An expert who was called to give evidence on the defendant's behalf, that expert, Prof Bakker, stated that a customary marriage is concluded only once the two families have been fused and that this takes place only once the bride has been handed over at the defendant's family residence. The lobola negotiations alone do not result in a marriage. The ceremony concluded on 16 March 2003 would not result in the parties being married. His evidence is in line with the defendant's belief that by participating in the ceremony he was not participating in a marriage ceremony.
- [24] There is support for the defendant's belief that the finalization of lobola negotiations does not result in a contract of marriage in the evidence of the expert who was called to give evidence on the defendant's behalf. That expert, Prof Bakker, stated that the customary marriage is concluded only once the two families have become fused and that this takes place only once the bride has been handed over at the defendant's family residence. The lobola negotiations alone do not result in a marriage. His evidence is in line with the defendant's belief that by participating in the ceremony he was not participating in a marriage ceremony.
- [25] The fact that there is room for Prof Bakker's view (even although it was not accepted as being a true statement of the law by the plaintiff's expert) lends credence to the defendant's statement that he believed that lobola negotiations would only result in an engagement.
- [26] The witnesses who were called by the defendant concerning the events at the lobola negotiations stated that the defendant had mandated them only to conclude an engagement not to conclude a marriage. They stated further that, they did not attend the ceremony with a view to consenting to a marriage and also that; in line with the mandate given they had not consented to a marriage. The evidence of the delegates is cogent, not improbable and cannot be rejected.
- [27] It is patent from the defendant's evidence and the evidence of his delegates that he neither intended to conclude a marriage nor agreed to conclude a marriage.
- [28] The defendant's evidence is credible, is supported by the probabilities and I am unable to reject it.
- [29] There are additional probabilities in favour of the defendant's evidence which support the findings on credibility.

- [30] On both the plaintiff and the defendant's evidence they intended to conclude a civil marriage. The plaintiff went so far as to state that it was agreed that it was a condition for the marriage that the civil marriage took place. At best for her on that evidence the finalization of lobola negotiations was but a step on the road to being married by the civil law. This probability favours the defendant's evidence.
- [31] On the parties return from Dubai arrangements were made for a civil marriage to take place. A wedding venue was booked and a pastor (a marriage officer) was found to conduct the marriage. These arrangements represented the implementation of the agreement that they would be married civilly. If the venue was to be used only to bless rings as was stated by the plaintiff, then a marriage officer would not be required.
- [32] No arrangements were made on the parties return from Dubai for any other place or time for a civil marriage to take place. This favours the finding that the arrangements made were the arrangement for a wedding.
- [33] The defendant wished to be married according to as he put it "a Christian marriage". This involved a priest officiating at the marriage. Steps were taken to achieve this result.
- [34] The plaintiff's evidence on the issue of when and where the civil marriage would take place is unreliable. It is probable that the parties who were eager to be married would (as they in fact did) do all things necessary to achieve fulfilment of the four conditions the plaintiff required to be met. It is probable that the steps taken originally to organize a wedding venue and a priest were for the purpose of celebrating a civil marriage. The plaintiff stated the parties would go to Home Affairs at some point. This was never arranged when it probably could and should have been if this was the parties' intention.
- [35] The plaintiff did not explain what would happen if there was a customary marriage and then no civil marriage. She assumed that if there was no civil marriage the parties would be married in any event as the customary marriage had been concluded. This assumption is not in line with the parties' express intention to marry by civil law. It is improbable that without more the defendant would agree to be married by customary union thereby:
- 35.1 negating the need for a civil marriage,
- 35.2 determining the property regime,
- 35.3 creating bonds which could only be undone by divorce.
- [36] The parties never discussed financial matters and they are both skilled people who have assets and have undergone divorces pursuant to their previous civil marriages. The defendant stated that he would have wanted to have concluded an ante-nuptial contract to regulate the proprietary relationship between the plaintiff and the defendant.
- [37] If the parties were to be married by customary union the immediate consequence would be that the parties would be married in community of property. Once the property regime was determined it would be impossible (absent plaintiff's consent) for the defendant to agree a

different regime and if that agreement could not be reached to decline to be married. At that stage on the plaintiff's evidence he would be bound as he was already married and the proprietary consequences had taken place. In my view it is improbable that the defendant would agree to be placed in that invidious position comprising the need to obtain a divorce and the inability to regularize his financial affairs by concluding an anti-nuptial contract. It is particularly improbable that he would allow this to happen without any discussion concerning financial matters.

- [38] It is probable had the defendant consented to be married he would have invited his family to the ceremony. It is common cause that the defendant's parents and daughter did not attend the lobola negotiations. There is no dispute the daughter would have attended the marriage. The defendant's evidence is that his parents would have attended a marriage. The plaintiff's evidence is that their attendance was not necessary. I accept that the defendant would have wanted his family to attend.
- [39] It is not uncommon for persons to enter into lobola negotiations which are successful and also to have a civil marriage. The indication is that the parties intend the civil marriage to be the time when they are married not the lobola negotiations.
- [40] It is probable that the parties did not intend for lobola negotiations to result in a position which would impact in any way upon their right to conclude a civil marriage on whatever basis they chose. The plaintiff contemplated the civil marriage as condition for marriage. This in my view means that she intended only to be married at that time and also that, that was the defendant's intention, they both having agreed to the condition. This being so whatever the status of the lobola negotiations the parties did not intend to become married on the finalization of the lobola negotiations.
- [41] The conduct of the parties subsequent to the marriage indicates that they both held themselves out as being single and did not take steps in any way to discuss or fuse their financial affairs.
- [42] I accordingly find that the defendant did not consent to be married by customary union.
- [43] As the defendant did not consent to be married and hence did not become married it is unnecessary to decide what effect of the ceremony of lobola negotiations is.
- [44] The parties are agreed that if I find the defendant did not consent the appropriate order is that I dismiss the plaintiff's claim. I make the following order.
- [45]
1. The plaintiff's claim is dismissed.
 2. The plaintiff is to pay the costs of the action including the costs consequent upon the employ of senior counsel and the qualifying fees of Professor Bakker.

C G LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:

23 MAY to 6 JUNE 2016

DATE OF

JUDGMENT:

15 JUNE 2016

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Prepared on 13 October 2026 · Esheria