

SOUTH AFRICA / JUDGMENT

Nefale v Nkosi and Others (2021/41524) [2022] ZAGPJHC 997 (7 December 2022)

[2022] ZAGPJHC 997**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Kemack

CASE / FILE NUMBER

2021/41524

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****number: 2021/41524****Date****of hearing: 23/11/2022****Date****delivered: 07/12/2022****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

07/12/2022

In

the matter between: ELIZABETH
SIMANGELE NEFALE
Applicant
And
EUNICE
SONTO
NKOSI
1st
Respondent
THE
DIRECTOR GENERAL: HOME AFFAIRS
2nd
Respondent
MINISTER
OF HOME
AFFAIRS
3rd
Respondent
MASTER
OF THE SOUTH GAUTENG HIGH COURT
4th
Respondent

JUDGMENT

KEMACK AJ:

1. The applicant is the sister and executor of the late July Hlabangwane. The purpose of the applicant's application is the reviewing and setting aside of the alleged registration of a customary union between the first respondent and the deceased.
2. As the Department of Home Affairs is responsible for registering customer reunions, the Director General: Home Affairs and Minister of Home Affairs have been cited as the second and third respondents.
3. As the first respondent's entitlement to a share of the estate of the deceased underlies the bringing of this application, the Master of the South Gauteng High Court has been cited as the fourth respondent.
4. The second, third and fourth respondents have not entered appearance to defend.
5. The applicant's prayers seek no direct relief against the first respondent, other than costs of suit in the event of opposition. Rather, the applicant's prayers are directed at the second and third respondents, whose alleged registration of the customary union the applicant seeks to have reviewed and set aside.

6. Although the application expressly and clearly seeks the review and setting aside of the administrative action of registering the alleged customary union, the applicant elected to bring this application as a normal application under Uniform Rule 6, rather than as a Uniform Rule 53 review. This was an unfortunate decision, because it has led to no documentary evidence being placed before the court in the form of a record of the administrative decision.
7. Indeed, the affidavits and their annexures before the court do not even include the marriage certificate that should have been prepared by the Department of Home Affairs, had the customary union been registered. While annexure “TSM4” to the applicant’s founding affidavit is a letter from the first respondent’s attorney referring to an attached copy of the marriage certificate, no marriage certificate is attached to the letter. Neither party has placed the marriage certificate before the court.
8. The recognition and registration of customary marriages is regulated by the Recognition of Customary Marriages Act No. 120 of 1998 (“the Act”) and the regulations promulgated under that act.
9. Section 4(4)(a) of the Act states that “A registering office must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed”.
10. Section 4(4)(b) states that “The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars”.
11. Section 4(5)(a) states that “If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to inquire into the existence of the marriage”.
12. Section 4(5)(b) states that “If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4)”.
13. Section 4(9) states that “Failure to register a customary marriage does not affect the validity of that marriage”.
14. Section 7(2) states that “A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses”. There appears to be no dispute that neither the deceased nor the first respondent was a partner in any other existing customary marriage.

15. Regulation 2(1) requires an application for the registration of a customary marriage to substantially correspond with Form A of the Annexure to the regulations.
16. Regulation 2(2) requires a registering officer to issue the applicant with an acknowledgment of receipt substantially corresponding with Form B of the Annexure.
17. Regulation 2(5) requires the resulting certificate of registration to substantially correspond with Form C of the Annexure to the regulations.
18. Although one would expect all three of these documents to be available if the customary marriage had been registered, these documents were not obtained from the second and third respondents as would presumably have happened had Uniform Rule 53 been used, and were not placed before the court by either the applicant or the first respondent.
19. Regulation 2(4) obliges the registering officer to include or cause to be included the particulars of the customary marriage in the population register, while regulation 2(5)(b) provides for the director-general of Home Affairs on application to issue a duplicate of the customary marriage certificate, issue an extract from the customary marriage register, and furnish a reproduction of the customary marriage register or of any supporting documentation in relation to the register. The applicant did not make a regulation 2(5)(b) application before instituting this application, and none of these documents were placed before the court.
20. In the absence of any of the appropriate documents serving as evidence that there was an administrative application resulting in registration of a customary union, in the 23 November 2022 hearing the court was not in a position to set aside such registration or even consider whether it was reviewable.
21. Counsel for the applicant submitted that it would suffice if the court found that there was no valid customary marriage between the first respondent and the deceased, and asked the court to make an order on that basis. This could not be done, first because such an order was not covered by the relief sought in the notice of motion, and second because the court's view was that the allegations in the first respondent's answering affidavit could not be rejected and were sufficient to materially dispute the applicant's allegations that no valid customary marriage had occurred.
22. On this basis, the parties agreed that the application should be postponed sine die with no order as to costs to enable the parties to obtain or attempt to obtain the required record of the impugned administrative decision to register the customary union.
23. The court's order is that:
 - 23.1. This application is postponed sine die by agreement;
 - 23.2. There is no order as to costs.

KEMACK AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT,

JOHANNESBURG

COUNSEL FOR APPLICANT: ADVOCATE BOTOMANE

ATTORNEY FOR APPLICANT: MATHIBE THABANG ATTORNEYS

ATTORNEY FOR 1ST RESPONDENT: F M MOLOI ATTORNEYS

DATE HEARD:

23 November 2022

DATE OF JUDGMENT:

7 December 2022

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