
SOUTH AFRICA / JUDGMENT

Netshitungulu v Letsoalo and Others (425/2019) [2020] ZALMPTHC 1 (5 May 2020) [2020] ZALMPTHC 1

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

425/2019

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IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION: THOHOYANDOU

CASE NUMBER: 425/2019

NETSHITUNGULU LIVHUWANI PRISCILA APPLICANT

AND

LETSOALO MMAKGOMO ONICA

FIRST RESPONDENT

ESTATE LATE NETSHITUNGULU THINANDAVHA

JONATHAN

SECOND RESPONDENT

MASTER OF THE HIGH COURT, PRETORIA THIRD RESPONDENT

MINISTER OF HOME AFFAIRS

FOUTH RESPONDENT

JUDGEMENT

AML PHATUDI J

INTRODUCTION

[1] The applicant seeks a declaratory order

‘1. That the purported civil marriage entered into by the First Respondent and the late Netshitungulu Thinandavha Jonathan on the 12th day of January 2006 is null and void ab initio.

2. That the fourth Respondent is ordered to cancel the registration of the purported civil marriage between the 1st Respondent and the late Netshitungulu Thinandavha Jonathan within ten (10) days of making of this order.

3. That Customary Marriage between Applicant and the late Netshitungulu Thinandavha Jonathan entered into on the 29th day of August 1994 be declared to be valid.

4. That the Customary Marriage between late Netshitungulu Thinandavha Jonathan and the applicant herein be registered by the 4th Respondent within 10 days of making of this order.

5. That the first respondent disclose all funds collected and received by her in her capacity as the executrix of the estate late Netshitungulu Thinandavha Jonathan and to pay all such money/fund collected from any institution or individual in the deceased (Netshitungulu Thinandavha Jonathan) estate account.

6. That the 1st Respondent pay the costs of this application in the event of her opposing it...’

[2] The first respondent opposes the application. Other respondents abides. The respondent raises several points in limine. After having heard submissions relating to the points in limine, I ordered parties to address the court on the main issues because the points raised are inter related to the main issues.

FACTS

[3] The applicant and Netshitungulu Thinandavha Jonathan (the deceased) met and fell in love. The applicant fell pregnant and gave birth to their child on 3 April 1993. Their families entered into lobola negotiations shortly after the birth of their first child. They celebrated their marriage in terms of the Venda Traditional Law and Customs.

[4] On 29 August 1994, the applicant and the deceased concluded a civil marriage at the then Thohoyandou Magisterial District, Northern Transvaal (now Limpopo). Their marriage was registered with the then Venda Department of Home Affairs. They lived together as husband and wife at house number 264, 5th Avenue, Salvokop, Gauteng Province until their marriage turned sour. They separated around 1999 when the deceased chased her out of the common home. The applicant backed to Tshidzini village, Limpopo. The deceased returned to their Tshidzini home around January 2018 due to his deteriorated health conditions to which he succumbed to on 9 November 2018.

- [5] The applicant met the first respondent for the first time when the deceased burial preparations were underway. The respondent claimed to be married to the deceased. She produced a marriage certificate. The applicant got shocked. The family held a meeting. The deceased family resolved that she (the applicant) should leave the house and to only return after the funeral. She complied.
- [6] On 30 November 2018, the applicant went to Thohoyandou Masters Office to register the deceased Estate and cause issue of the letters of executorship. She was informed that the first Respondent has already been appointed as the executrix. She found it appropriate to engage people with legal knowledge for assistance. She approached Thohoyandou Justice Centre for legal assistance.
- [7] It is common cause that both the applicant and the first respondent are in possession of valid marriage certificates. The then Republic of Venda[1] issued the applicant's marriage certificate and that of the respondent by Department of Home Affairs, Republic of South Africa.
- [8] It is further common cause that the Republic of Venda was one of the homelands. All law that was in force when the democratic Republic of South Africa Constitution took effect continued to be in force. It is further common cause, if not trite law, that all legislation that was in force in the Republic of Venda continued to be in force and administered by the authorities that administered it when the new democratic Republic of South Africa Constitution took effect[2].
- [9] It is further common cause and as rightly conceded to by both parties' legal representatives that a customary marriage and a civil marriage are both types of legal marriages that can be registered according to customary law[3] or civil law[4] but not both. Where a man and a woman between whom a customary marriage subsists and, they later conclude a civil marriage with each other, their civil marriage takes precedent and not vice versa[5].
- [10] The parties' concession in relation to the law governing different marital regimes renders prayers 3 and 4 of the applicant's notice of motion moot. There is thus no need for their consideration.
- [11] Counsel for the applicant conceded outright that the second respondent cannot sue or be sued other than through the executor/ executrix. He concedes that the point raised falls to be upheld. There is thus no need for consideration of this in limine point either. I will deal with costs implications for non-consideration of the said prayers herein below.
- [12] Both counsel representing the applicant and the first respondent concedes that a civil marriage concluded between parties where one them is already married to someone else or where the contracting parties are both wrong in believing that a previous marriage of one contracting party had ended by divorce or death, such marriage is invalid ab initio. This, again, renders prayers 1 and 2 of the applicant's notice of motion moot. Counsel for the respondent submits, notwithstanding his concession, that it is only a court of law that must

declare and decree that the marriage is invalid. He further submits that this court has no jurisdiction to declare such marriage null and void, as raised in limine.

ISSUE

- [13] The only issue to be determined is whether this court has jurisdiction to grant the declaratory order in respect of prayers 1 and 2 set out in the notice of motion.

LAW

- [14] Section 21 of the Superior Courts Act (Sup CA) provides that '[a] Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and of all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, ...'
- [15] Harms DP penned in *Gallo Africa LTD and Others v Sting Music (Pty) LTD and Others*[6] that '[j]urisdiction means the power vested in a court to adjudicate upon, determine and dispose of a matter. Importantly, it is territorial... In other words, jurisdiction depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases, on both. It does not depend on the substantive merits of the case or the defence relied upon by the defendant'. (Footnotes omitted).
- [16] Harms further says that in so far as the point that the plaintiff is an incola is concerned, "the domicile of the plaintiff never determines jurisdiction..."[7] This implies that "the defendant must be or reside within the area of jurisdiction of court."
- [17] Counsel for the Respondent submits that this court does not have jurisdiction to nullify the marriage concluded by and between the deceased and the first respondent. The first respondent and the deceased got married in Pretoria and their property, in which they resided, is in Gauteng Province. Counsel for the applicant was found wanting in his response.

EVALUATION

- [18] It is trite law that a Division has jurisdiction over all persons who resides and in relation to all causes arising within its area of jurisdiction.[8] Further, the law is settled that 'the domicile of the plaintiff never determines jurisdiction'[9] but where the causes of action arose is the determining factor.
- [19] In casu, the first respondent resides or is domiciled in Gauteng Province. She got married to deceased in Gauteng Province. Matters arising from Gauteng Province do not fall within the area of jurisdiction of this court. The applicant was not a party to the marriage concluded between the first respondent and the deceased. I cannot agree more with the submissions made by counsel for the first respondent that the residence of the applicant cannot clothe this court with the power to nullify the marriage concluded by the first respondent and the deceased. In short, this court does not have the power to adjudicate upon, determine and dispose off, of the applicant's prayers 1 and 2 set out in the notice of motion.

COSTS

[20] It is trite law that ordinarily, the first respondent, as the successful party, should receive its costs. The first respondent succeeded substantially in opposing the applicant's application and substantially succeeded with her in limine points. This results in costs following the event.

[21] I thus make the following order.

ORDER

21.1 The first respondent's points in limine are upheld

21.2 The applicant's application is dismissed with cost.

AML PHATUDI

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Mr. N.R Khomola

Legal Aid South Africa

Thohoyandou

Counsel for the first respondent: Mr I Mahlangu

Mahlangu Isaac Inc

Pretoria

Judgement:

14 April 2020

Handed down electronically: 05 May 2020

Applicant: RodneyK@legal-aid.co.za

First Respondent: mahlangu@mahlanguisaacinc.co.za

Third Respondent: AMashau@justice.gov.za

[1] The Republic of Venda was one of the 'Independent Homelands' which had a status of a 'Republic' and dealt with in South African legislation as an independent or self-governing territory. These 'Republics' were Transkei,

Bophutatswana, Venda and Ciskei. They were known as TBVC States/Bantustans.

[2] Section 241 of the Constitution. It provides that 'Schedule 6 applies to the transition to the new constitutional order

established by this Constitution, and any matter incidental to that transition'.

- [3] Marriages are registered in terms of Recognition of Customary Act
- [4] Marriages Act 25 of 1961 or Matrimonial Property Act 88 of 1984
- [5] Section 10 of Recognition of Customary Marriages Act 120 of 1998 provides that ‘(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person. (2) A customary marriage entered into after the commencement of this Act 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, unless such consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property system of their marriage.
- [5] Section 10 of Recognition of Customary Marriages Act 120 of 1998 provides that
- ‘(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.
- (2) A customary marriage entered into after the commencement of this Act 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, unless such consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property system of their marriage.
- [6] Gallo Africa LTD and Others v Sting Music (Pty) LTD and others 2010
- (6) SA 329 SCA paragraph [6]
- [7] Ibid paragraph [8]
- [8] Section 21
- [9] Gallo Ibid para[8]

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