

SOUTH AFRICA / JUDGMENT

Ngcwabe-Sobekwa v Sitela and Others (1155/2020) [2020]

ZAECMHC 51 (20 October 2020)

[2020] ZAECMHC 51

COURT

Eastern Cape High Court, Mthatha

BEFORE

Dawood

CASE / FILE NUMBER

1155/2020

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION: MTHATHA)

CASE

NO. 1155/2020

In

the matter between:

LULAMA
NOLUBABALO CATHERINE
NGCWABE-SOBEKWA
Applicant
and
BUYISWA
SITELA
1st
Respondent
YONELA
SITELA
2nd
Respondent

AVBOB
3rd
Respondent

JUDGMENT

DAWOOD J:

1. The main application herein has been disposed of in terms of an order that was granted on the date of hearing wherein it was agreed that the deceased would be buried on or before the 21 August 2020 and the order sought in the counter-application would be dealt with after the burial.
2. The order pertaining to the burial reads as follows:

“(1) The body of the deceased must be released to Nkosazana Rhoda Sobekwa, the deceased mother;

 - (2) The body of GCOBANI KENNETH SOBEKWA, (the deceased) shall be buried at his home at Ecwecweni Location, Ngcobo, Eastern Cape in his family grave yard;
 - (3) The funeral of the deceased shall be conducted as soon as reasonably possible from the date of this order and not later than 21st August 2020 subject to confirmation by the SANDF.
 - (4) The Applicant and the 1st Respondent are hereby authorized to attend the funeral of the deceased, to pay their last respect and perform any tradition rituals thereto;
 - (5) The SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF), is hereby authorized to perform its state duties at the funeral in terms of the law and without any interference from either the Applicant or the Respondents or any other person;
 - (6) The SANDF is directed to handover the National Flag or any procedural handover that in accordance with the Army procedure is normally handed to the spouse of the Deceased, shall in this case be handed over to Nkosazana Rhoda Sobekwa the mother of the deceased.
 - (7) The first respondent is directed to pay the storage costs of Mtshe Funeral Services;
 - (8) The Station Commander of Engcobo Police Station (SAPS) is directed to assign members to attend the funeral and are authorized to keep public order and arrest any person in contravention of this Court order.
 - (9) The ruling on the validity of any of the two marriages is reserved for later determination.
 - (10) No order as to costs.”
3. Both the applicant and the first respondent were accordingly granted equal spousal rights at that stage and therefore it was deemed

inappropriate to make a finding on the issue of who the “actual” spouse of the deceased was prior to the date of burial.

4. The issue for determination at this stage is the counter-application by the first respondent wherein she seeks the following relief:

“(1) That it is hereby declared that a customary marriage exists between the Applicant (the 1st Respondent in the main application) and the deceased, the late Gcobani Kenneth Sobekwa);

- (2) That the marriage between the 1st Respondent (who is the Applicant in the main application) and the deceased be declared null and void;
- (3) That the late registration of the customary marriage between the Applicant (1st Respondent in the main application) and the deceased is hereby condoned;
- (4) That the Minister of the Department of Home Affairs (second respondent) be and is hereby ordered and directed to register the marriage referred to in paragraph 1 above, in terms of the provisions of Section 4
- (7) of the Recognition of Customary Marriages Act 120 of 1998;
- (5) That the second respondent be and is hereby ordered and directed to issue the First Respondent with a marriage certificate.
- (6) The costs of this application to be paid by the 1st respondent (the Applicant in the main application).”
5. The parties will be referred to as in the main application.
6. The crucial issue for determination accordingly is who the true spouse of the deceased is. This will require a determination of the issue of whether or not there was a valid customary marriage.
7. The issue then, if it is found that there was a customary marriage, is which of the two marriages is the lawful marriage, the civil one entered into between the applicant and the deceased or the customary marriage concluded between the 1st respondent and the deceased which predates the civil marriage.
8. The first respondent alleged that she and the deceased concluded a customary law marriage during August 1988 and 2 children were born of their marriage namely Y[...] in 1989 and K[...] in 1998.
9. She sets out the customary traditions that were followed including the sending of delegations of the representatives of the two families the lobola negotiations and payment and the utsiki ceremony which was conducted and the 1st respondent given a maiden name Alunamda and that she was handed over to her new family. This was confirmed by the deceased family

including his mother.

10. The Applicant could not meaningfully dispute the existence of the customary marriage save to say that the deceased had told her that the First Respondent was merely a girlfriend, and she alleged further that if the deceased had intended marrying the First Respondent he would have entered into a civil union with her, as he had done with someone else who he subsequently divorced.
11. The deceased seemed to have been a master of deception getting all the women in his life to believe whatever he told them, and clearly

appeared to have had numerous relationships as demonstrated by the number of children he had from different women during his lifetime.

12. The 1st respondent appears to have been aware of the other relationships although she states she was unaware that a legal marriage was concluded between the applicant and the deceased predominantly because the deceased glibly denied this to her and his family again demonstrating how the deceased had mastered the art of deception.
13. The Applicant made a bald denial of the first respondent averments pertaining to the customary marriage and the confirmatory affidavit

provided without putting forth any grounds or evidence for her denial of the compliance with the customary requirements and the formalities for a customary marriage. The bare denial does not create a dispute of fact nor does it warrant an acceptance of her version in the face of over whelming evidence in contrast to her bare denial.

14. The Applicant could not gainsay the first respondent's averments pertaining to the fact that a valid and binding customary marriage had been duly concluded and a bare denial thereof does not accordingly constitute a basis for rejecting the averments that there was a valid customary marriage.
15. She could not meaningfully deny the same as she was not present or party to the proceedings nor did she even know the deceased at that time.
16. Accordingly in the circumstances the court accepts that the marriage between the first respondent and the deceased was a valid and binding customary marriage, despite the fact that it was not registered at the time or subsequent thereto and despite the fact that the deceased concluded 2 civil marriages subsequently.
17. The conclusion of two civil marriages by the deceased does not detract from the existence of the customary marriage or the validity thereof.
18. The customary marriage meets the requirement of section 3 (the Recognition Act) of the Recognition of Customary Marriages Act 120 of 1998.[1]
19. Section 3 reads as follows:

“(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;
 - (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.
- (2) Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage”.

Section 3 (3) of the Recognition Act provides further requirements that must be met for a customary marriage to be valid, which are: (1) consent of the fathers and/or the grooms/in-laws; (2) lobola agreement; and

(3) incorporation of the bride into the husband’s family.[2]

20. The 1st respondent did not comply with section 4 of the Act which reads as follows:

“Registration of customary marriages

- (1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.
- (2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.
- (3) A customary marriage –
 - a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or
 - b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.
- (4) (a) A registering officer 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 lobola agreed to and any other particulars prescribed.
- (b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

...”

21. Section 4 (9) of the Recognition Act, however provides that failure to register a customary marriage does not affect the validity of that marriage.
22. The deceased obviously would not have attempted to register the customary marriage in light of the fact that he had entered into civil marriages which he was not competent to enter into after he had concluded the customary marriage, without the consent of the first respondent herein.
23. The applicant in her answering affidavit to the counter application at paragraph 4 (c) at page 131 specifically pleaded that the marriage did not comply with section 4 of the Recognition Act due to its non-registration and was therefore null and void or voidable. She failed to take cognisance of the provisions of section 4 (9) of the Recognition Act when making that allegation.
24. Section 3(2) precluded the deceased from entering into a marriage under the Marriage Act 25 of 1961 during the subsistence of the customary marriage.
25. The Marriage and Matrimonial Property Amendment Act 3 of 1988 further prevents any person who is a partner in a customary union from contracting a marriage with another person during the subsistence of that union.
26. The 1st respondent’s counsel accordingly correctly argued that the civil marriage concluded between the applicant and the deceased in 2006, whilst the deceased was in a customary marriage with the 1st respondent, is null and void as it falls foul of the provisions of both the Recognition Act and the Marriage and Matrimonial Property Amendment Act of 1988.
27. The courts have dealt with the issue of consent of the first spouse in *Nhlapo v Mahlanga*[3] where it was, inter alia, held at paragraph 33:

“Both experts agree that when a man wants to enter into a second customary marriage he must have the first wife’s approval. The Applicant did not consent nor permit the deceased to enter into a second customary marriage with the first respondent ... The consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3 (1) (b) of the recognition Act. It is therefore clear that the first respondent’s subsequent customary marriage did not comply with the consent requirement and cannot be recognised as valid and is null and void.” (My emphasis.)
28. The first respondent has satisfied the requirement of establishing that there was a valid customary law marriage concluded between the parties and discharged the onus resting upon her in her counter application to prove the validity of the customary law union. She further established and that she had not consented to the deceased marriage to the applicant or even been aware of the same due to the deceased’s denial of it. This fact confirms that he did not seek the first respondent consent.

29. The applicant, save for a bare denial, was unable to meaningfully dispute the existence of the customary marriage or the first respondent

assertion that she had not consented to the deceased entering into a marriage with the applicant.

30. In *Mayelane v Ngwenyama and another (Womens' Legal Centre Trust and others as amici curiae)*[4] it was, inter alia, held at par 71:

“Are the first wife’s rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that “even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children”. While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.

Second, where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife’s equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.

Third, the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity. However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage.

Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner’s consent.” (My emphasis.)

31. Accordingly unfortunately for the applicant despite the fact that there was a civil union that was duly registered, that did not give rise to a valid and binding marriage in light of the customary marriage which predates the civil marriage and which was not terminated, and further no consent was obtained from the first wife, being the first respondent herein. The civil marriage is accordingly null and void and of no force and effect.
32. I do not propose dealing with the issue of whether or not this Court is able to direct the Minister of Home Affairs to register a customary marriage in this case, after the death of one of the spouses or issue a marriage certificate as the factors for failing to do so was not fully pleaded or argued in the present matter. In any event as was correctly pointed out by the 1st respondents counsel failure to register the customary marriage does not have a bearing on

the validity of the customary marriage so it is unnecessary to deal with that part of the relief sought.

33. The first respondent did not in any event seek an order expunging the civil marriage of the deceased to the applicant and that relief

cannot be granted in the circumstance, which is a necessary step prior to registering or attempting to register or ordering the registration of the customary marriage.

34. It is however evident that the second respondent would in any event be obliged to expunge the civil marriage since it has been declared null and void and of no force and effect in terms of this order, but that would be for the first respondent to pursue with the second respondent who did not participate in these proceedings despite being cited as a party.
35. I am not disposed to making any costs order against the applicant in light of the fact that she appears to have believed that she had the law on her side in light of the fact that her civil marriage was duly registered and she was also deceived by the deceased into believing that no marriage existed between him and the first respondent.
36. In the circumstances I make the following order:
- a) That it is declared that a valid and binding customary marriage existed between the deceased and the 1st respondent (the applicant in the counter-application).
 - b) That the civil marriage concluded between the deceased and the applicant (the 1st respondent in the counter application) be and is hereby declared null and void in light of the pre-existing customary marriage and is accordingly of no force and effect.
 - c) Each party to pay their own costs in respect of the application and the counter-application.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE OF BURIAL

(JUDGMENT RESERVED:

21 AUGUST 2020

DATE DELIVERED:

20 OCTOBER 2020

FOR THE APPLICANT:

MR NOMVETE

APPLICANT'S ATTORNEYS:

NOMVETE & PARTNERS INC

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FOR THE RESPONDENTS:

MR MBIKO

RESPONDENT'S ATTORNEYS:

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27 VICTORIA STREET

CATHEDRAL BUILDING

MTHATHA

[1] Mbungela and Another v Mkabi and Others 2020

(1) SA 41 (SCA); Fanti v Boto and Others 2008

(5) SA 405 (C).

[2] Nhlapo v Mahlangu and Others (GP) unreported case no 59900/14 of 20 March 2015 at para 18.

[3] Nhlapo (note 2 above) at para 33.

[4] 2013

(8) BCLR 918 (CC) at paras 71-4.

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