

SOUTH AFRICA / JUDGMENT

Ngobeni v Ngobeni (24844/03)

[2005] ZAGPHC 53 (12 May 2005)

[2005] ZAGPHC 53

COURT

High Courts - Gauteng

BEFORE

Ranchod

CASE / FILE NUMBER

24844/03

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

/BBIN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) DATE 12 MAY 2005 CASE NO: 24844/2003 IN THE MATTER BETWEEN: ELIZABETH BAKGONNENG NGOBENI APPLICANT AND MOSHIBUDI BETTY SEABELA (NGOBENI) RESPONDENT JUDGMENT RANCHOD, AJ [1] In this matter the applicant seeks the following order:

(a) Nullifying the marriage entered into between the late Mr Peki Philemon Ngobeni and the respondent on 2 May 2003. (b) That the applicant be regarded as the widow of the late Mr Peki Philemon Ngobeni. (c) That the costs of this application be costs in the cause. [2] The applicant states that she was married to the late Peki Philemon Ngobeni ("the deceased") in community of property on 21 February 1975. An abridged marriage certificate issued by the Department of Home Affairs on 19 May 2003 (the date stamp is not clear on the certificate) was attached to the founding affidavit in support of this averment. According to this certificate the marriage was in community of property. At the hearing of the matter applicant's counsel informed me that this certificate was extracted from the manual records of the Department of Home Affairs in Germiston, where the marriage had been solemnised. Applicant states that the deceased left her in 1999 to cohabit with the respondent. [3] The deceased died on 16 June 2003. A copy of the death certificate attached to the founding affidavit reflects his marital status at date of death to be "married". Applicant alleges that while arrangements were being made for his funeral on 18 June 2003, she discovered that the deceased and the respondent had been "fraudulently and clandestinely married to each other". A further annexure was attached to the founding affidavit which was a computer generated document headed "particulars from the population register IRO." This document reveals that the deceased was married to the respondent on 2 May 2003 – some 42 days prior to the deceased's death. [4] The respondent alleges that she and the deceased began cohabiting in 1993 and not 1999 as averred by the applicant. The respondent

further aver that the deceased had told her family and in public that he was divorced from the applicant. This was at the time when the deceased met her family to determine and arrange payment of lobola. During 1994 lobola was negotiated and paid by the deceased after the ceremonial requirements were met. Accordingly, the respondent and deceased were therefore married in terms of customary law. They were then purportedly married by civil law on 2 May 2003.^[5]

The respondent filed a conditional counterclaim to the effect that, if the court were to hold that the marriage between applicant and the deceased subsisted when deceased died (which was denied) then, it should

be declared that the marriage between the deceased and the respondent was a putative marriage.

The respondent also prayed for some ancillary relief. Furthermore the respondent's prayed that the putative marriage be declared as one in community of property; that the children of the respondent and deceased be declared legitimate and that the two children of the respondent from a previous relationship, who were adopted at customary law by the deceased be declared legitimate.^[6]

During 1 July 2003, the Master of the High Court of this division appointed the applicant as executrix in the deceased's. On 18 September 2003, following upon an application by the respondent, Van Rooyen AJ granted an order (case no 25901/2003) as follows: "1.

That the first respondent in her capacity as executrix, be and is hereby interdicted from administering, dealing with, disposing of or liquidating any of the assets in the deceased estate of the late Pheki Philemon

Ngobeni, under Master's Reference number 10346/03, pending the finalisation of the application under case number 24844/03,

in the High Court of South Africa, Transvaal Provincial Division. 2. That costs of this application be and is hereby costs in the application under case number 24844/2003." Nowhere in the papers is it alleged that there were any children born of the marriage between the applicant and the deceased. The

respondent states that four children (all minors) were born of her marriage with the deceased.

^[7] From the papers it is evident that the following facts are common cause: (a) The applicant knew of the customary marriage between respondent and the deceased; (b) The applicant had contact with the deceased before he passed away; (c) The applicant was aware, at least in 1999 that the deceased had left their marital home to go and live with the respondent; (d) The applicant had maintained contact with the deceased's family as evidenced by the fact that she was involved in the funeral arrangements two days after the deceased's death. (e) The deceased's mother introduced the respondent to the applicant shortly after the customary marriage took place.^[8] In our law, two civil marriages between a man and two women cannot co-exist. Any civil marriage purportedly entered into during the existence of a valid civil marriage is in law, null and void. The crisp issue to be decided in casu is whether the applicant was in fact divorced from the deceased when he purportedly entered into a civil marriage with the respondent. The applicant has a marriage certificate indicating her marriage to the deceased on 21 February 1975. This is from the manual records kept by the Department of Home Affairs in Germiston. Needless to state that the Department of Home Affairs is responsible for keeping such records. Respondent submitted that "shortly after 1994 there was a general call in the country for all persons married prior to that date and specifically, I believe black persons to register their marriages at the Department of Home Affairs. The reason for this

was that prior to this, such marriages had not been captured on (its) computer systems". It was further submitted that divorce records were also, prior to 1994, not computerised and hence, the

respondent could not obtain proof of the divorce of the applicant and the deceased.[9]It is a tried and hallowed principle of our law that he who alleges must prove. There is no proof, other than the respondent's allegations and hearsay, that the deceased had divorced the applicant. The best evidence of a divorce is a Final Decree of Divorce issued by a competent court. In the circumstances, I find that a valid

civil marriage existed between the applicant and the deceased at all material times even at the time of the latter's death. I therefore need not make an order in terms of prayer (b). However it is clear that the deceased had entered into a customary marriage with the respondent. In the circumstances of this case, this does not entitle the respondent to an order that her marriage to the deceased be declared a putative marriage. In law, this amounted to bigamy. On the applicant's own version, it is clear that she was, at all material times, aware of the customary marriage between the deceased and the respondent.

Further, she was aware that the deceased and the respondent cohabited as man and wife.

Significantly she was also aware that children

were born between the deceased and the respondent. Furthermore the deceased's mother introduced the respondent to the applicant

after the customary marriage was concluded. All these important events took place without any objection from the applicant. If the

applicant did not consent to the customary union between the deceased and the respondent, she acquiesced therein. In any event, I

did not understand the applicant to be denying the existence of the customary union.[10] For the sake of clarity, I wish to point out that the order which I intend to make, will not preclude the respondent and her children from submitting claims as heirs in the estate of the deceased. It is for the Master to decide whether he accepts or rejects the claims. I accordingly make the following order:

1. The registration of the marriage between the respondent and the late PEKI PHILEMON NGOBENI by the Department of Home Affairs as a civil marriage is declared null and void; 2. The applicant is declared to be the widow of the late PEKI PHILEMON NGOBENI; in terms of civil law; 3. The respondent's conditional counter-claim is dismissed; 4. No order is made as to costs. N RANCHODACTING JUDGE OF THE HIGH COURT FOR THE APPLICANT: ADVINSTRUCTED BY: FOR THE RESPONDENT: ADVINSTRUCTED BY: HEARD ON:

/BB

IN THE HIGH COURT OF
SOUTH AFRICA

(
TRANVAAL
PROVINCIAL DIVISION) DATE
12 MAY 2005
CASE NO: 24844/2003

CASE NO: 24844/2003
IN THE MATTER BETWEEN: ELIZABETH BAKGONNENG NGOBENI
APPLICANT AND MOSHIBUDI BETTY SEABELA (NGOBENI)
RESPONDENT

IN THE MATTER
BETWEEN:

ELIZABET
H
BAKGONNENG NGOBENI
APPLICANTANDMOSHIBUDI BETTY SEABELA (NGOBENI)
RESPONDENT

JUDGMENT

RANCHOD,AJ

RANCHOD

,

A

J

[1]In this matter the applicant seeks the following order:(a)

[1]

In this matter the applicant seeks the following order:

(a)

Nullifying the marriage entered into between the late Mr Peki Philemon Ngobeni and the respondent on2 May 2003.

Nullifying the marriage entered into between the late Mr Peki Philemon Ngobeni and the respondent on

2 May 2003

.

(b)

That the applicant be regarded as the widow of the late Mr Peki Philemon Ngobeni.

(c)

That the costs of this application be costs in the cause.

That the costs of this application be costs in the cause

[2]The applicant states that she was married to the late Peki Philemon Ngobeni (“the deceased”) in community of property on21February 1975. An abridged marriage certificate issued by the Department of Home Affairs on 19 May 2003(the date stamp is not clear on the certificate)wasattached to the founding affidavit in support of this averment.According to thiscertificate the marriage was in community of property. At the hearing of the matter

applicant's counsel informed me that this certificate was extracted from the manual records of the Department of Home Affairs in Germiston, where the marriage had been solemnised. Applicant states that the deceased left her in 1999 to cohabit with the respondent.

[2]

The applicant states that she was married to the late Peki Philemon Ngobeni ("the deceased") in community of property on

21

February 1975

. An abridged marriage certificate issued by the Department of Home Affairs on 19 May 2003 (the date stamp is not clear on the certificate)

was

attached to the founding affidavit in support of this averment.

According to this

certificate the marriage was in community of property. At the hearing of the matter applicant's counsel informed me that this certificate was extracted from the manual records of the Department of Home Affairs in Germiston, where the marriage had been solemnised. Applicant states that

the deceased left her in 1999 to cohabit with the respondent.

[3] The deceased died on 16 June 2003. A copy of the death certificate attached to the founding affidavit reflects his marital status at date of death to be "married". Applicant alleges that while arrangements were being made for his funeral on 18 June 2003, she discovered that the deceased and the respondent had been "fraudulently and clandestinely married to each other". A further annexure was attached to the founding affidavit which was a computer generated document headed "particulars from the population register IRO." This document reveals that the deceased was married to the respondent on 2 May 2003 – some 42 days prior to the deceased's death.

[3]

The deceased died on

16 June 2003

. A copy of the

death

certificate attached to the founding affidavit

reflects

his marital status at date of death to be “married”. Applicant alleges that while arrangements were being made for his funeral on

18 June 2003

she discovered that the deceased and the respondent had been “fraudulently and clandestinely married to each other”. A further annexure was attached to the founding affidavit which was a computer generated document headed “particulars from the population register IRO.” This document reveals that the deceased was married to the respondent on

– some 42 days prior to the deceased’s death.

[4]The respondent alleges that she and the deceased began cohabiting in 1993 and not 1999 as averred by the applicant. The respondent further aversthat the deceased had told herfamily and in public that he was divorced from the applicant. This was at the time when the deceased met herfamily to determine and arrange payment of lobola. During 1994 lobola was negotiated and paid by the deceasedafterthe ceremonial requirements were met.Accordingly, therespondent and deceased were therefore married in terms of customary law. They were then purportedly married by civil law on2 May 2003.[5] The respondent filed a conditional counterclaim to the effect that, if the courtwere to hold that the marriage between applicant and the deceased subsisted when deceased died (which was denied) then, it should be declared that the marriage between the deceased and the respondent was a putative marriage. The respondent also prayed for someancillary relief.Furthermorethe respondent’s prayed that the putative marriage be declared as one in community of property; that the children of the respondent and deceasedbe declared legitimate and that thetwochildren of the respondent from a previous relationship, who wereadopted at customary law by the deceased be declaredlegitimate.

[4]

The respondent alleges that she and the deceased began cohabiting in 1993 and not 1999 as averred by the applicant. The respondent further

avers

that the deceased had told her

f

amily and in public that he was divorced from the applicant. This was at the time when the deceased met he

r

family to determine and arrange payment of l

o

bola. During 1994 l

bola was negotiated and paid by the deceased

after

the ceremonial requirements were met.

Accordingly, the

respondent and deceased were therefore married in te

ms of customary law. They were then purportedly married by civil law on

.^[5] The respondent filed a conditional counterclaim to the effect that, if the court

were to hold that the marriage between applicant and the deceased subsisted when deceased died (which was denied) then, it should be declared that the marriage between the deceased and the res

pondent was a putative marriage. The respondent also prayed for some

ancillary relief.

Furthermore

the respondent's prayed that the putative marriage be declared as one in community of property; that the children of the respondent and deceased

be declared legitimate and that the

two

children of the respondent from a previous relationship

, who were

adopted at customary law by the deceased be declared

legitimate.

[6] During 1 July 2003, the Master of the High Court of this division appointed the applicant as executrix in the deceased's. On 18 September 2003, following upon an application by the respondent, Van Rooyen AJ granted an order (case no 25901/2003) as follows:-

[6] During

1 July 2003

, the

Master of the High Court of this division appointed the applicant as executrix in the deceased's.

On

18 September 2003

, following upon an application by the respondent, Van Rooyen AJ granted an order (case no 25901/2003) as follows:-

“1. That the first respondent in her capacity as executrix, be and is hereby interdicted from administering, dealing with, disposing of or liquidating any of the assets in the deceased estate of the late Pheki Philemon Ngobeni, under Master’s Reference number 10346/03, pending the finalisation of the application under case number 24844/03, in the High Court of South Africa, Transvaal Provincial Division.

2. That costs of this application be and is hereby costs in the application under case number 24844/2003.”

2.

That costs of this application be and is hereby costs in the application under case number 24844/2003.”

Nowhere in the papers is it alleged that there were any children born of the marriage between the applicant and the deceased. The respondent states that four children (all minors) were born of her marriage with the deceased.

Nowhere in the papers is it alleged that there were any children born of the marriage between the applicant and the deceased. The respondent states that four children (all minors) were born of her marriage with the deceased

[7] From the papers it is evident that the following facts are common cause:

[7]

From the papers it is evident that the following facts are common cause:

The applicant knew of the customary marriage between respondent and the deceased;

The applicant had contact with the deceased before he passed away;

T

he applicant had contact with the deceased before he passed away;

The applicant was aware, at least in 1999 that the deceased had left their marital home to go and live with the respondent;

he applicant was aware, at least in 1999 that the deceased had left their marital home to go and live with the respondent;

(d)

The applicant had maintained contact with the deceased’s family as evidenced by the fact that she was involved in the funeral arrangements two days after the deceased’s death.

he applicant had maintained contact with the deceased's family as evidenced by the fact that she was

involved in the

funeral arrangements two days after the deceased's death.

(e)

The deceased's mother introduced the respondent to the applicant shortly after the customary marriage took place.

he deceased's mother introduced the respondent to the applicant shortly after the customary marriage took place.

[8]In our law, two civil marriages between a man and two women cannot co-exist. Any civil marriage purportedly entered into during the existence of a valid civil marriage is in law, null and void. The crisp issue to be decided in casu is whether the applicant was in fact divorced from the deceased when he purportedly entered into a civil marriage with the respondent. The applicant has a marriage certificate indicating her marriage to the deceased on 21 February 1975. This is from the manual records kept by the Department of Home Affairs in Germiston. Needless to state that the Department of Home Affairs is responsible for keeping such records. Respondent submitted that "shortly after 1994 there was a general call in the country for all persons married prior to that date and specifically, I believe black persons to register their marriages at the Department of Home Affairs. The reason for this was that prior to this, such marriages had not been captured on (its) computer systems". It was further submitted that divorce records were also, prior to 1994, not computerised and hence, the respondent could not obtain proof of the divorce of the applicant and the deceased.

[8]

In our law, two civil marriages between a man and two women cannot co-exist.

Any civil marriage purportedly entered into during the existence of a valid civil marriage is in law,

null

and

void

The crisp issue to be decided

in casu

is whether the applicant was in fact divorced from the deceased

when he purportedly entered into a civil marriage with the respondent

. The applicant has a marriage certificate indicating her marriage to the deceased on 21 February 1975

. This is from the manual records kept by the Department of Home Affairs in Germiston.

Needless to state that the Department of Home Affairs is responsible for keeping such records.

Respondent submitted that “shortly after 1994 there was a general call in the country for all persons married prior to that date and specifically, I believe black persons to register their marriages at the Department of Home Affairs. The reason for this was that prior to this, such marriages had not been captured on (its) computer systems

”

. It was further submitted that divorce records were also, prior to 1994, not computerised and hence,

the respondent could not obtain proof of the divorce of the applicant and the deceased.

[9]It is a trite and hallowed principle of our law that he who alleges must prove. There is no proof, other than the respondent's allegations and hearsay, that the deceased had divorced the applicant. The best evidence of a divorce is a Final Decree of Divorce issued by a competent court. In the circumstances, I find that a valid civil marriage existed between the applicant and the deceased at all material times even at the time of the latter's death. I therefore need not make an order in terms of prayer (b).

[9]

It is

a

trite

and hallowed principle of our law

that he who alleges must prove. There is no proof,

other than

the respondent's allegations and hearsay, that the deceased had divorced the applicant.

The best evidence of a divorce is a Final Decree of Divorce issued by a competent court. In the circumstances, I find that a valid civil marriage existed

s

ted

between the applicant and the deceased

at all material times even

at the time of the latter's death.

I therefore need not make an order in terms of prayer (b).

However it is clear that the deceased had entered into a customary marriage with the respondent. In the circumstances of this case, this does not entitle the respondent to an order that her marriage to the deceased be declared a putative marriage. In law, this amounted to bigamy. On the applicant's own version, it is clear that she was, at all material times, aware of the customary marriage between the deceased and the respondent. Further, she was aware that the deceased and the respondent cohabited as man and wife. Significantly she was also aware that children were born between the deceased and the respondent. Furthermore the deceased's mother introduced the respondent to the applicant after the customary marriage was concluded. All these important events took place without any objection from the applicant. If the applicant did not consent to the customary union between the deceased and the respondent, she acquiesced therein. In any event, I did not understand the applicant to be denying the existence of the customary union.

However it is

clear that the deceased had entered into a customary marriage with the respondent.

In the circumstances of this case, this

does not entitle the respondent to an order that her marriage to the deceased

be declared

a putative marriage.

In law, this amounted to bigamy.

On

the applicant's

own

version, it is clear that she was, at all material times, aware of the customary marriage between the deceased and the respondent. Further, she was aware that the deceased and the respondent cohabited as man and wife. Significantly she was also aware that children were born between the deceased and the respondent. Furthermore the deceased's mother introduced the respondent to the applicant after the customary marriage was concluded. All these important events took place without any objection from the applicant. If the applicant did not consent to the customary union between the deceased and the respondent, she acquiesced therein. In any event, I did not understand the applicant to be denying the existence of the customary union.

[10]For the sake of clarity,I wish to point out that the order which I intend to make, will not preclude the respondent and her children from submitting claims as heirs in the estate of the deceased.It is for the Master to decide whether he accepts or rejects the claims.I accordingly make the following order:

[10]

For the sake of clarity,

I wish to

point out that the order

which I intend to make, will

not preclude the respondent and her children from submitting claims as heirs in the estate of the deceased.

It is for the Master to decide whether he accepts or rejects the claims.

I accordingly make the following order:

1.

The registration of the marriage between the respondent and the late PEKI PHILEMON NGOBENI by the Department of Home Affairs as a civil marriage is declared null and void;

The

registration of the

marriage between the respondent and the late PEKI PHILEMON NGOBENI by the Department of Home Affairs as a civil marriage is declared null and void

;

The applicant is declared to be the widow of the late PEKI PHILEMON NGOBENI; in terms of civil law;

applicant is declared to be the widow of the late PEKI PHILEMON NGOBENI;

in terms of civil law;

3.

The respondent's conditional counter-claim is dismissed;

respondent's

conditional counter-claim is dismissed

4.

No order is made as to costs.

N RANCHOD

ACTINGJUDGE OF THE HIGH COURTFOR THE APPLICANT:ADVINSTRICTED BY:FOR THE
RESPONDENT: ADVINSTRICTED BY:HEARD ON:

ACTING

JUDGE OF THE HIGH COURT

FOR THE APPLICANT:

DVINSTRICTED BY:FOR THE RESPONDENT: ADVINSTRICTED BY

:

HEARD ON:

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2005/53.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ngobeni-v-ngobeni-unknown-topic-agphc-2005>

Prepared on 11 October 2026 · Esheria