

SOUTH AFRICA / JUDGMENT

Nthejane and Another v Road Accident Fund (3183/2010) [2011] ZAFSHC 196 (1 December 2011) [2011] ZAFSHC 196

COURT

Free State High Court, Bloemfontein

BEFORE

S Naidoo

CASE / FILE NUMBER

3183/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. 3183/2010

In the matter between:

MAMPHO ERNESTINAH NTHEJANEFirst Plaintiff

BONGANI JUNIOR NTHEJANESecond Plaintiff

(assisted by his mother and natural
guardian, Mampho Ernestinah Nthejane)

and

THE ROAD ACCIDENT FUNDDefendant

JUDGMENT BY: NAIDOO, AJ

HEARD ON: 10 NOVEMBER 2011

DELIVERED ON: 1 DECEMBER 2011

NAIDOO AJ

- [1] The first plaintiff, Mampho Ernestinah Nthejane (plaintiff), also acting on behalf of the second plaintiff, her minor son Bongani (Bongani), sued the defendant for certain damages arising out of the death of Lethusang Johannes Azor (the deceased). She alleges that she was married to the deceased in terms of a customary union. The deceased was also Bongani's biological father.
- [2] Mr C Snyman represented the plaintiffs and Mr WJ Groenewald represented the defendant. Both counsel informed the court that most issues in dispute have been settled and that the only issue for the court to decide was whether or not the plaintiff was married to the deceased in terms of a customary union. The matter accordingly proceeded only on that issue. The plaintiff called the evidence of her grandfather, Simon Nthejane and she also testified.
- [3] Mr Nthejane's evidence was that his daughter, the plaintiff's mother, abandoned her when she was a baby, and he raised the plaintiff. Her biological father was not at all involved in her upbringing. She then had a relationship with a man called Bazooka and they had a child, Bongani. It was established that the deceased's nickname was Bazooka. When Mr Nthejane approached the deceased's grandmother, she indicated that her family would like to take the plaintiff as their daughter-in-law. They agreed to enter into lobolo negotiations, which did take place, and it was agreed that they would give him 10 cows in respect of lobolo. It seems that it was agreed that this would be done at a later date, because a traditional ceremony, in accordance with Sotho culture, was held at the house of the deceased's family where the plaintiff was made to wear traditional bridal clothes and a sheep was slaughtered as part of the ceremony to welcome her as a daughter-in-law of the Azor family. She thereafter took up residence in the home of the deceased. It was also Mr Nthejane's evidence that although the lobolo had not yet been paid, it was his intention to claim it from the Azor family. The plaintiff was, nevertheless regarded as the wife of the deceased.
- [4] The plaintiff testified and corroborated her grandfather's evidence in all material respects. She confirmed that the deceased's nickname was Bazooka, and that the traditional ceremony that was held was in fact a marriage ceremony to welcome her as a daughter-in-law of the deceased's family. She also confirmed that she took up residence in the deceased's home as his wife, following the traditional ceremony. The plaintiff testified, in addition, that she was thereafter given the name "Malebohang", in accordance with the custom of the deceased's family, and which meant "mother of Bongani". According to the plaintiff, she would not have been given this name if the sheep had not been slaughtered and she had not gone to live with the deceased's family.

Mr Snyman, representing the plaintiff, applied for an amendment to the plaintiff's Particulars of Claim, to reflect that her relationship with the deceased was a customary union. The defendant did not object to the amendment, which was accordingly granted.

The plaintiff then closed her case. The defendant closed its case without leading any evidence.

- [5] The legislation regulating customary marriages is the Recognition of Customary Marriages Act 120 of 1998 (the Act). Section 3(1) of the Act provides as follows:

“For a customary marriage entered into after the commencement of this Act to be valid –

the prospective spouses –

must both be above the age of 18 years; and

must both consent to be married to each other under customary law; and

the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

- [6] It is common cause in this matter that the lobolo negotiations as well as the customary ceremony and celebration described by the plaintiff and her grandfather were performed after the Act came into operation and therefore, section 3(1) would be applicable.

- [7] The plaintiff’s evidence was that she and the deceased were both above the age of 18 when they decided to marry, and both had consented to be married to each other in terms of customary law. The defendant has not disputed the evidence of Simon Nthejane that he concluded lobolo negotiations with the deceased’s grandmother and it was agreed that he would receive 10 cows as lobolo. It has also not been disputed that following upon this agreement, the traditional ceremony and celebration took place.

- [8] The defendant, however, contended that the plaintiff cannot claim to have entered into a customary union as the lobolo had not been paid. Mr Groenewald referred me to the work “Inheemse Reg” by the learned authors NJJ Olivier and WJ Olivier, Butterworths 1998, in which they said at page 24:

“Geen geldige gebruikelike verbinding kan plaasvind sonder dat daar ‘n ooreenkoms aangegaan is omtrent die lewering van lobolo-beeste nie. Gebruike verskil van gemeenskap tot gemeenskap betreffende die getal, tydstip van lewering, ensovoorts, maar die algemene reël (behalwe klaarblyklik by die Pondo) is dat ten minste een bees gelewer moet word voor die aanvang van die huwelikseremonies.”

They go on to describe the various forms of delivery that are possible and acceptable.

The learned author Schäfer in the work “Family Law Service”, Section G- “Customary Family Law” – Issue 53 indicates the situation in similar terms in paragraph G35, page 23 where he says:

“The general rule is that the payment of ikhazi is an essential requirement for entry into a customary marriage” (Ikhazi is a term used to refer to dowry cattle). Schäfer goes on to say that there are exceptions and qualifications to this rule, one such exception being that amongst tribes practising teleka, the dowry cattle need not necessarily be paid before the marriage is entered into. Teleka, in essence, is the customary inducement to pay lobolo practised in some tribes where lobolo is not paid before or at the time of the marriage. The wife’s guardian detains the wife and/or children to remind the husband to pay lobolo. The husband normally would pay another “instalment” of lobolo and fetch his wife and/or children.

(see Customary Law in South Africa, TW Bennett, page 232/3).

[9] The plaintiff is Sotho. Neither she nor her grandfather were asked about the customs and practises of the Sotho people, nor was it canvassed with them whether they practise teleka or not. From Mr Nthejane's evidence, it is clear that the arrangement regarding lobolo was acceptable to both families. In the absence of any evidence to the contrary, it must be accepted that this arrangement was not only suitable to both families but also that it was in accordance with their customary practices.

[10] Both counsel referred me to the matter of *FANTI v BOTO AND OTHERS* 2008(5) SA 405 (C). Although this matter deals with the practises of the Xhosa people, the views expressed by the learned judge, Dlodlo J, in respect of customary marriages have application in the present matter. At paragraph 19 on page 413, the learned judge deals with the essential requirements that must be established to prove the existence of a customary marriage and comments that

"payment of lobolo remains merely one of the essential requirements. In other words, even if the payment of lobolo is properly alleged and proved, that alone would not render a relationship a valid customary marriage."

The learned judge continues thus

"All the authorities are in agreement that a valid customary marriage only comes about when the girl... has been formally transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family occurs. Her acceptance by the groom's family and her incorporation into his family are ordinarily accompanied by well-known extensive rituals and ceremonies involving both families [para 22]... The importance of these rituals and ceremonies is that they indicate in a rather concretely visible way that a customary marriage is being contracted and that lobolo has been paid and/or the arrangements regarding the payment of lobolo have been made and that such arrangements are acceptable to the two families – particularly the bride's family" [para23] (my underlining)

[11] The evidence tendered on behalf of the plaintiff, therefore, established the following:

11.1 The plaintiff and the deceased were both above the age of 18 years at the time they were married;

11.2 Both the plaintiff and the deceased consented to be married to each other by customary law;

11.3 The marriage was properly negotiated, and celebrated in accordance with customary law. Although lobolo was not paid, adequate arrangements, which were accepted by both families, were made for payment of lobolo.

11.4 The plaintiff was "handed over" to the family of the deceased and took up residence in his family home after the ceremonies were performed.

I am satisfied that the rituals and ceremonies performed by the two families incorporated the essential legal requirements, as provided for in section 3(1) of the Act, and that the plaintiff has established on a balance of probabilities that such a union was a valid customary marriage.

[12] Mr Groenewald cross examined the plaintiff regarding the contents of certain affidavits and documents that were submitted to the defendant when her claim was lodged. The plaintiff's evidence was that her child was in hospital and she was fetched from the hospital and taken to the attorney's office in order to sign the documents. She signed them without being fully aware of the contents of these documents. She was accompanied by the deceased's mother, who it seems also deposed to an affidavit and pressured the plaintiff into signing the affidavit that she did. The plaintiff acknowledged that the documents referred to her as co-habiting with the deceased, and not that she was in a customary union with him. Although the plaintiff conceded that she understood some Afrikaans, it is my view that in the absence of evidence to the contrary, it is not implausible or far-fetched

that she would have signed documents upon the request of a legal representative, whose legal expertise she trusted and who was

mandated to lodge a claim on her behalf. This is especially so in view of the fact that her child was in hospital and, therefore, it is not unreasonable to expect that she would have been in a fragile or distracted state of mind.

[13] It was also pointed out that the death certificate reflected the deceased's marital status as "single". This was not taken any further with the plaintiff or at all. The author of the document is unknown, as are the circumstances under which such a certificate was completed. No evidence was presented as to the source of the information upon which the death certificate is based. The plaintiff can now hardly be expected to answer for such an entry in the death certificate and, much less, be visited with an adverse inference against her as a result of such an entry. Similarly, Mr Groenewald criticised the plaintiff for not calling an available witness, namely the mother of the deceased. It was never asked of the plaintiff whether such a witness was in fact available. Again it is my view that, in this respect too, this court cannot make an adverse inference, against the plaintiff.

[14] The defendant closed its case without leading any evidence. It was open to the defendant to call not only the evidence of the deceased's mother but also evidence, if any, regarding customary practices of the Sotho people, with regard to customary marriages, in order to negate the evidence tendered by the plaintiff and her grandfather. It clearly chose not to do so.

[15] I, accordingly, make the following order:

15.1 The plaintiff was married to the deceased in terms of a valid customary marriage

15.2 The defendant is ordered to pay the plaintiff's proven or agreed damages, arising from the death of Lethusang Johannes Azor;

15.3 The defendant is to pay the plaintiff's costs of suit.

S. NAIDOO, AJ

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