
SOUTH AFRICA / JUDGMENT

Ntoagae v Makabanyane and Another (M420/2015) [2015] ZANWHC 78 (12 November 2015) [2015] ZANWHC 78

COURT

North West High Court, Mafikeng

BEFORE

DJAJE

CASE / FILE NUMBER

M420/2015

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: M420/2015

In the matter between:

PHISTOS NTOAGAE

Applicant

AND

TROY MAKABANYANE

First Respondent

MAYABA FUNERAL SERVICES

Second Respondent

DATE OF HEARING

: 10 OCTOBER 2015

REASONS

FOR JUDGMENT : 12 NOVEMBER 2015

COUNSEL FOR THE APPLICANTS : ADV KUAPANE

COUNSEL FOR RESPONDENTS : MR MOTSHABI

REASONS

FOR JUDGMENT

DJAJE AJ

[1] This matter was brought before me as an urgent application on 9 October 2015 at 15h45 and I granted an order in the following terms:

IT IS ORDERED:

“THAT: 1. That the application is heard on an urgent basis and that condonation is granted for non-compliance with the Court Rules pertaining to time limits and service.

2.1 That the First and/or Second Respondent and/or any person acting under their instruction and authority is interdicted, prohibited and/or restrained from burying or otherwise depositing the remains of the late Gaehumelwe Natalia Tsietso on the 10 October 2015 or any other date.

2.2 The Second Respondent and/or any person acting on its instruction and authority is interdicted, prohibited and /or restrained from releasing and/or handing over the remains of the late Gaehumelwe Natalia Tsietso to the First Respondent and/or any other person.

2.3 The Second Respondent and/or any person acting on its instruction and authority is directed to hand over the remains of the late Gaehumelwe Natalia Tsietso to the Applicant or his nominated funeral undertakers.

2.4 In the event of non-compliance with paragraphs 2.1, 2.2 and 2.3 above the Sheriff is authorized and directed to immediately seize the corpse of the late Gaehumelwe Natalia Tsietso and deliver same to the Applicant or his nominated funeral undertakers.

2.5 That the Respondent opposing this application be ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved.

3. That a rule nisi is hereby made and issued calling upon the Respondents to furnish reasons if any, on Thursday 15 October 2015 at 10h00 why an order in the above terms should not be made final.”

[2] The said Rule Nisi was anticipated by the first Respondent. Due to the urgent nature of the application I immediately after hearing evidence made the following order:

“THAT:

1. Rule Nisi granted on the 09th October 2015 is hereby discharged.
2. Applicant is ordered to pay the costs of this application.

3. 1st Respondent is hereby allowed to bury the deceased Gaehumelwe Natalia Tsietso at her chosen place burial.”

[3] I now furnish the reasons for the above order as requested by the First Respondent on 20 October 2015.

[4] The Applicant brought this application to interdict the First Respondent (deceased mother) from burying the deceased on 10 October

2015 as he considered himself having the sole right to bury. The deceased, Gaehumelwe Natalia Tsietso passed away on 22 September

2015. In the founding affidavit the Applicant averred that he was married to the deceased in terms of customary marriage with the

lobola having being paid to the deceased's family on 27 April

2013. The customary marriage was never registered with the Department of Home Affairs, however proof of the lobola payment was issued by the Batlharo ba ga Masibi Traditional Council on 29 April 2013.

[5] In the founding affidavit it was further alleged by the Applicant that he was legally married to the deceased and they were living together at their matrimonial home in Dihatshwane village. The Applicant was moved to bring this application urgently after he was advised by the First Respondent on 9 October 2015 that she intends to bury the deceased at Disaneng village on 10 October 2015 at 07h00.

[6] Due to the nature and urgency of the matter the First Respondent was not able to file an answering affidavit and she gave her evidence orally in court. She testified that she is the mother of the deceased and the Applicant is known to her as having paid lobola to her family for the deceased on 27 April 2015. She further testified that after the lobola was paid there was no celebration of the customary marriage. She explained that if the deceased was handed over to the family of the Applicant to have the process of the customary marriage completed, there would have been a customary marriage according to the Tswana cultural practice. It was her testimony that since the deceased was not married she has the right to bury her and had already made funeral arrangements.

Submissions

[7] It was the Applicant's case that there was a customary marriage entered into between him and the deceased as they had been residing together since the payment of the lobola. Further that the deceased's family had accepted that the deceased handed herself over to the Applicant to illustrate the existence of a customary marriage. It was however conceded by the Applicant that no formal handing over of the bride (deceased) was done between the two families but that was seen as a technicality.

- [8] The First Respondent on the other hand relied on the decision of *Fanti v Boto and Others* 2008 (5) SA 405 (C) at par 22 where it was held that:

“..... All authorities are in agreement that a valid customary only comes about when the girl (in this case the deceased) has been formerly

transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom’s husband and her incorporation into his family is ordinarily accompanied by well-known extensive ritual and ceremonies involving both families”

- [9] It was therefore contended by the First Respondent that since there was no handing over of the bride to the Applicant’s family, the customary marriage had not been concluded and as such the Applicant was not entitled to bury the deceased.

Law

- [10] The requirements of a customary marriage have been set out by Olivier, Bekker and Others in their work *Indigenous Law* (LexisNexis) as:

“ i a consensual agreement between two (2) family groups with respect to the two individuals who are to be married and the lobolo to be paid;

ii. the transfer of the bride by her family group to the family of the man.”

- [11] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 deals with the requirements for the validity of a customary marriage and provides that:

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

- (i) Must both be above the age of 18 years; and
 - (ii) Must both consent to be married to each other under customary law; and
 - (iii) The marriage must be negotiated and entered into or celebrated in accordance with customary law”
- [12] In the matter of *Motsoatosa v Roro and Others* [2011] 2 All SA 324 (GSJ) Matlapeng AJ held as follows at par 19 and 20:

“[19] One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family namely that of the groom. As the man’s family gained a daughter through the marriage, from her family, the bride is invariably handed over to him at his family’s residence. Handing over of the bride (go gorosa ngwetsi(Tswana)/ ukusiwa ko makoti e mzini e hamba noduli (Xhosa)) is not only about celebration with the attendant feast and rituals. It encompasses the most important aspect associated with married state namely go laya/ukuyala/ukulaya in vernacular. There is no English equivalent of this word or process but loosely translated it implies “coaching” which includes the education and counselling both the bride and groom by the elders of their rights, duties

and obligations which a married state imposes on them. This is the most

important and final step in the chain of events and happens in the presence of both the bride and the groom's families. One can describe this as the official seal in the African context, of the customary marriage.

[20] The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom's people there can be no valid customary marriage. T. W. Bennet, Customary Law in South Africa 18th Edition states at 217 that:

"Hence, when the Recognition of Customary Marriages Act provides that, in order to qualify as customary, a marriage must be 'negotiated and entered into or celebrated in accordance with customary law', the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions. In terms of practised or living customary law the bride cannot hand herself over to the groom's family. She has to be accompanied

by relatives."

[13] There are a number of decisions regarding the right to bury collated in the case of Gabavana and Another v Mbetse and Others [2000] 3 ALL SA 561 (Tk). These decisions boil down to the finding that the heir of the deceased estate shall be the person who decides on the arrangements

surrounding the burial of the body.

Analysis

[14] The Applicant bears the onus to prove that there is a valid customary marriage between him and the deceased and as such he does have the right to bury the deceased. The Applicant was unable to dispute that the formal handing over of the deceased to his family never took place. Such process has been described by the Applicant as a mere technicality because it was his intention and that of the deceased to enter into a customary marriage. I am unable to agree with the submission as it is clear from the authorities stated above that the handing over of the bride "is the most important and final step in the chain of events and happens in the presence of both the bride and the groom's families. One can describe this as the official seal in the African context, of the customary marriage." See Motsotsoa vs Roro supra.

[15] The argument by the Applicant that the deceased handed herself over by residing with him cannot stand. A customary marriage is not exclusively about the parties themselves but envelopes the families of the respective parties. This therefore entails the involvement of the two families from the inception of the lobola negotiations to the ultimate handing over of the bride.

[16] There is no evidence before me that the deceased left a will indicating who should have the responsibility of arranging her burial. In my view the Applicant has not succeeded to establish that a customary marriage existed between him and the deceased.

In that regard, the Applicant has not established any right whatsoever to bury the deceased. The first rule of the burial principle was stated by Voet 11.7.7 Commentary on the Pandects as follows:

“1. Person chosen by the deceased must bury:

“The funeral besides must be carried out by him whom the person departing this life has chosen”

2. Who may bury if none chosen? If the deceased did not impose the duty of burial on anyone, the matter will affect those who have been named in the last will as the heirs.
3. Who may bury if none chosen? If no one has been so named, it affects the legitimate children or the blood relations each in their order of succession”

[17] The probabilities favour the First Respondent in that in the absence of a customary marriage, the legitimate child of the deceased is next in line. However, this child is still a minor and hence the First Respondent is cited herein. It is therefore the First Respondent who has the duty and right to bury the deceased. Regard must also be had to the practical considerations that the First Respondent has from the beginning made arrangements for the funeral and burial. She has incurred costs which will be wasted if the burial is taken out of her hands.

Costs

[18] The First Respondent is an elderly woman who was frog marched to court in the late hours of Friday to be in court until Saturday just before the funeral, when she could have been mourning the passing of her daughter. It is for that reason that I ordered the Applicant to pay the costs of this application.

DJAJE AJ

ACTING JUDGE OF THE HIGH COURT

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Prepared on 14 October 2026 · Esheria