

SOUTH AFRICA / JUDGMENT

R.M.M v E.J.M and Others (20528/2019) [2020] ZAGPPHC 291 (25 June 2020)

[2020] ZAGPPHC 291

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

20528/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

Case

Number: 20528/2019

In

the matter between: R[....]
M[....]
M[....]
Applicant
(I.D
NO. [....])
and
E[....]
J[....]
M[....]
First Respondent
(I.D NO. [....])
DEPARTMENT OF
HOME AFFAIRS
Second Respondent
MINISTER OF
HOME AFFAIRS
Third
Respondent

JUDGMENT

KUBUSHI J

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

- [1] This application was decided on the basis of arguments submitted on behalf of the parties in lieu of oral argument in accordance with paragraph 25.2 of the Judge President's Revised Supplementary Directive in re Operations in Pretoria and Johannesburg High Courts, during the extended Covid-19 Lockdown and for the remainder of term 2/2020. The applicant and the respondents' legal representatives agreed to file written argument in an attempt to have the matter disposed of without oral argument.
- [2] The applicant, R[....] M[....] M[....], approached court in terms of the provisions of section 4 (6) of the Recognition of Customary Marriages Act 120 of 1998 ("the Act") for an order declaring that she and E[....] J[....] M[....], the first respondent herein, concluded a valid customary marriage on 4 October 2014.
- [3] Ancillary to that order, the applicant seeks an order directing the Department of Home Affairs and the Minister of Home Affairs, the second and third respondents herein, to register the customary marriage alleged to exist between the applicant and the first respondent and to issue the applicant with a marriage certificate within thirty (30) days of the granting of the court order.

- [4] The applicant approached court for the relief she seeks because she alleges that she entered into a customary marriage with the first respondent but the marriage was not registered and the first respondent is now denying the existence of such a marriage. The first respondent is opposing the application on the grounds that he is not married under customary law to the applicant and that the applicant is not her customary law wife.

MATRIX

- [5] The background facts on which the applicant relies for her case are summarised in the heads of argument as follows:-
- [6] The applicant and the first respondent started a love relationship in 2010. Three years after being in a relationship they were blessed with a child on 9 September 2013. On 4 October 2014 the applicant's family representatives and the first respondent's family representatives met at the residence of the applicant to discuss the issue of marriage of the applicant by the first respondent. The applicant's family was represented by: C[....] M[....] and G[....] I[....] M[....]. The first respondent's delegation consisted of: B[....] N[....], S[....] N[....] and J[....] M[....].
- [7] Pursuant to the negotiations that followed at that meeting, the two families agreed on an amount of R40 000 (forty thousand rand) as lobola to be paid by the first respondent. On the same day an amount of R9 800 (nine thousand eight hundred rand) was paid as part payment towards the lobola and a balance of R30 200 (thirty thousand two hundred rand) was outstanding. The applicant attached a letter which was signed by both family representatives as proof of such lobola negotiations to the papers.
- [8] After the payment of the deposit the applicant was handed over to the first respondent's family. This was done apparently when the applicant's aunt conducted certain traditional rituals to officially hand the applicant over to the first respondent's family and the two families exchanged gifts in terms of the customary practice. Friends and various family members of the two families were also in attendance at the handing over celebration. From that day the applicant and the first respondent stayed together as husband and wife and only separated in 2017.
- [9] The parties regarded each other as customary law spouses. The applicant went to the extent of adding the first respondent as a spouse in her Discovery Health Medical Aid Scheme and also took out a funeral cover for him with AVBOB Mutual Assurance Society as a spouse.
- [10] The marriage went sour in 2017 when the applicant found out that the first respondent was having an extra marital relationship and even has a child outside of their marriage.
- [11] The first respondent is opposing the application and has in opposition raised a preliminary issue of a factual dispute and various other defences on the merits. In essence the first respondent is denying the existence of a valid customary marriage between himself and the applicant. The first respondent admits that a meeting of both his and the applicant's families took place as stated by the applicant, he, however, does not agree with the applicant that a

customary marriage was concluded at that meeting. His defence is that the requirements for the conclusion of a valid customary marriage were not met in that firstly, an outstanding amount of R30 200 (thirty thousand two hundred rand) in respect of the lobola has not been paid; secondly, the amount R9 800 (nine thousand eight hundred rand) paid was not for lobola but was for damage in terms of the Zulu culture of inhlawulo that requires that a man who wishes to marry a woman with whom he had a child with before such marriage must first pay damage before paying lobola - the lobola money must be paid after, which was not done in this case; thirdly, the bride was never handed over, in that, certain rituals like umhlabiso (when the bride's family comes over to the groom's family and a cow is slaughtered and each family takes half of the slaughtered cow) and ukukotisa (when the bride or umakoti is left with her in-laws to carry out her wifely duties and only after she has successfully carried out her duties does she move in with her husband) were never carried out; and lastly, the marriage was never consummated as the first respondent never lived with the applicant as husband and wife.

THE PRELIMINARY ISSUE

- [12] The first respondent has raised a preliminary issue which should be dealt with before the merits. The preliminary issue is in actual fact intertwined with the merits of this matter. Thus, in deciding the preliminary issue I will at the same time be deciding the merits as well.
- [13] The first respondent argues that there is a factual dispute, which the applicant ought to have foreseen, which cannot be dealt with on these papers alone. The factual disputes according to the first respondent are completely contradictory and can clearly be properly ventilated on trial.
- [14] The submission is that the applicant is abusing the court's procedure to expect the court to adjudicate these factual disputes which are completely contradictory and clearly, can only be properly ventilated on trial. He referred in reliance to this argument to the seminal judgment in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[1] where the following principles were enunciated:

A real dispute of facts arises:

- (a) Where the respondent denies substantial factual allegations of the applicant and makes conflicting factual allegations against those of the applicant, which the applicant denies.
- (b) Where the respondent admits factual allegations, but on the other hand alleges facts which the applicant disputes.
- (c) Where the respondent alleges that he does not have knowledge of the allegations made by the applicant or his deponents are unreliable, untrustworthy or prejudicial and that certain facts upon which the applicant relies to prove the main facts are untrue.

- [15] The first respondent contends that the applicant did foresee that there will be a dispute of facts by her allegations in paragraph 10.3 of her founding papers wherein she alleges that the first respondent denies the existence of the marriage, and, as such, requests the court to dismiss the application with costs.

THE LAW

- [16] In terms of Uniform Rule 6 (5) (g) where an application cannot be properly decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave to such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to the pleadings or definition of issues, or otherwise.
- [17] Courts have also held that where the material facts are in dispute, and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.[2]
- [18] As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the other party's allegations are farfetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or viva voce evidence would not disturb the balance of probabilities appearing from the affidavit.[3]

DISCUSSION

- [19] From the aforesaid it can easily be deduced that the existence of a dispute of fact in the papers on motion proceedings does not necessarily mean that the said application cannot be heard. The approach of the court hearing such a matter should be whether such an application cannot properly be decided on affidavit or on the papers as they stand.
- [20] In my opinion, this application can be properly decided on the papers as they stand despite the dispute of facts that is said to exist. Firstly, whether or not the negotiations that were undertaken on 4 October 2014 pertained to a customary marriage can be ascertained from the contents of a document that was signed at the negotiations. This, as such, calls for the interpretation of the document. Interpretation, as has been held, is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses.[4] On that basis alone, this matter can be decided on the papers as they stand.
- [21] What is at issue herein is whether the meeting of 4 October 2014 was held as negotiations for a customary marriage or as negotiations for inhlawulo.

[22] The proper approach to interpretation has been recently enunciated in the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.^[5] The court in that judgment stated as follows:

'[18] ... The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Donges NO and Another* [1950

(4) SA 653 (A) at 662G - 663A], namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.'

[23] It is trite that there are no formalities required in the drafting of letters written and/or agreements entered into at the conclusion of negotiations of this nature. As such the letters and/or agreements in respect thereof are mostly very rudimentary. However, from the reading of the letter in this instance, it is quite clear that the family members had met for the marriage of M[....] R[....] M[....]. That is what is stated in the heading of the letter. The first sentence of the letter also refers the marrying of the young lady. There is thus no contradiction in my view why the two family representatives had met on that day. If the meeting was meant to discuss damage (inhlawulo) this is what the heading of the letter would have stated. I do not get a sense that the first respondent denies that the payment of lobola was negotiated at the meeting, his proposition is that only the amount of damages was paid and that no lobola payment has been made.

[24] It does appear that the issue of damage was discussed at the meeting, because of the child as would normally occur - the word damage is stated in the letter. In my opinion, the amount of R40 000 (forty thousand rand) agreed to was for both the marriage inclusive of the amount of damage. The letter does not state different amounts for marriage and for damage. Therefore, the first respondent is disingenuous to want this court to believe that the amount of R 9 800 (nine thousand eight hundred rand) was for the payment of damage only. In any event, this argument does not assist him because the sole purpose of the meeting was for marriage negotiations, as I have found.

[25] Having made a finding that the family representatives met to negotiate the marriage between the applicant and the first respondent, the issue that follows is whether a valid customary marriage was entered into.

[26] I am in agreement with the first respondent's contention that material disputes of facts do exist in this matter. This is so because the first respondent denies the existence of the marriage or that the requirements for the conclusion of a valid customary marriage were met. However, the reasons proffered by the first respondent why it cannot be said that the requirements for a valid customary marriage were met, are in my view, farfetched or so clearly untenable as to be rejected merely on the papers. I say so for the reasons that follow hereunder.

[27] The Supreme Court of Appeal in *Tsambo v Sengadi*[6] had the occasion to deal with the issue of the validity of a customary marriage whereat the main issue decided by that court was

the handing over of the bride. In dealing with that issue, the court also dealt with customary rituals and traditions which normally

pertain to customary marriages, as was also raised by the first respondent in his defence, in this instance. I, as such, find it

apposite that I quote extensively from that judgment. The court in *Tsambo* had this to say:-

"[12] Before us, it was contended on behalf of the respondent that the requirement of handing over of the bride is not determinative of a customary marriage. As authority for that proposition, the respondent relied on the writings of Professor Bennett and Professor Bekker with specific regard to the evolution of the customary marriage practices of the Batswana people, which is the customary law that is applicable in the present case. Professor Bekker in *Seymour's Customary Law in Southern Africa*, argued that amongst the Sotho-Tswana people, the wedding is celebrated at the bride's family home, where the lobola negotiations take place. In some of the communities, the handing over of the bride takes a physical form on the day of the wedding. Professor Bekker proceeds to observe as follows:

'On the completion of the lobola agreement, the bride's guardian provides a beast for slaughter, each party receiving half the meat; certain ceremonies are performed with the entrails. This slaughter signifies not only the completion of the lobola agreement, but also the consummation of the customary marriage, which is not rendered less effective if the bride does not leave with the bridegroom's party on that occasion, and usually she does not.'

[13] It is clear from the preceding discussion that historically, significance was paid to the conclusion of the lobola agreement, and not necessarily the full payment of lobola. Therefore, the appellant's contention that a marriage could not have been concluded as it was agreed that part of the outstanding balance on the lobola would be paid 'at the next meeting' is devoid of any merit. In my view, it simply does not follow that the completion of the customary marriage process on the same day was precluded because it was not pertinently discussed during the negotiations. As mentioned above, the crisp question in this matter is whether, on the facts of this case a customary marriage came into existence. The handing over of the bride is an issue that was raised by the appellant as proof that the existence of a customary marriage had not been established. The facts must be considered against the backdrop of relevant authorities.

[14] Section 3(1) of the Recognition of Customary Marriages Act provides:

'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; and
 - (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.'

[15] When dealing with customary law, it should always be borne in mind that it is a dynamic system of law. In *Ngwenyama v Mayelane and Another*[7] this Court stated as follows:-

'The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.'

[16] In *Mabuza v Mbatha*[8] the court, stated that there was no doubt that the custom of ukumekeza[9] had evolved so much so that it is probably practised differently than it was centuries ago. It went on to endorse the view that it was inconceivable that ukumekeza had not evolved and that it could not be waived by agreement between the parties and/or their families in appropriate cases. That dictum was approved by this Court in *Mbungela and Another v Mkabi and Others*. [10] Having reviewed several authorities, this Court concluded

that the handing over of the bride, though important, is not a key determinant of a valid customary marriage. It aptly stated as follows:

'The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.'

[17] The appellant's contentions pertaining to the rituals observed during the handing over of the bride ceremony fail to take into account that customary law is by its nature, a constantly evolving system. That customary law has always evolved is evident from the following

observation made by Professor Bennett almost three decades ago and approved in many judgments :

'In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters. Aside from this, the indigenous rituals might be supplanted by exotic ones: a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast and for many a church ceremony has become indispensable.'[11]

[18] It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law."

[28] As argued by the applicant, it is trite that the amount of lobola does not have to be paid in full for the customary marriage to validly exist. The respondent's contention that the amount of R30 200 (thirty thousand two hundred rand) is still outstanding and as such there is no valid customary marriage is indeed bad in law and cannot stand. The court in Tsambo[12] stated also that historically, significance was paid to the conclusion of the lobola agreement, and not necessarily the full payment of lobola. In this instance, the lobola agreement has been entered into; an amount of R9 800 (nine thousand eight hundred rand) was paid in part payment of the lobola and the amount for damage. Even if the argument by the first respondent that the amount of R9 800 (nine thousand eight hundred rand) was meant for the payment of damage, but following on what was said in Tsambo, the conclusion of the lobola agreement itself would validate the existence of the customary

marriage.

- [29] From the aforesaid remarks in Tsambo it is evident that the first respondent's contention pertaining to the failure by the applicant's family to comply with the rituals observed during the process of handing over of the bride fail to take into account that customary law is by its nature, a constantly evolving system. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law.
- [30] In addition, the applicant states in her founding papers that on the same day after the negotiations were concluded, her aunt conducted a traditional ritual to officially hand her over to the family of the first respondent and the two families exchanged gifts in terms of her customary practice and friends and various members of the two families attended the celebration. Except to say that Zulu rituals like *ukuhlabisa* and *ukukotisa* were not carried out, the first respondent does not in his response gainsay these allegations.
- [31] The first respondent raises, for the first time, the defence of consent in the heads of argument. It is argued on his behalf that the fact that he indicates in his opposing papers that the amount paid on the day was for damage clearly indicates the lack of consent by him to marry under customary law as required ins 3 (1) (a) (ii) of the Act. This was never raised in the answering affidavit and is thus litigation by ambush. Besides I have found that the meeting was held to negotiate the customary marriage of the applicant and the first respondent.

THE

CONCLUSION

- [32] I am satisfied that this application can be properly decided on the papers as they stand despite the dispute that is said to exist. As I have said earlier in this judgment, the issue of dispute of facts and the merits of the matter are intertwined, thus, from the aforesaid it is clear that the applicant must succeed with her application.
- [33] The applicant as the successful party is entitled to her costs of suit.

THE ORDER

- [34] In the circumstances, I make the following order:-

1. The marriage negotiated and entered into between the applicant and the first respondent on 4 October 2014 is declared a valid customary marriage.

2. The second respondent is directed to register the customary marriage between the applicant and first respondent and to issue the applicant with a marriage certificate within thirty (30) days of the granting of this order.
3. The first respondent is ordered to pay the costs of this application.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel

: Adv. N. Makhani

Applicant's Attorneys

: Raboramulele Attorneys.

First Respondent's Counsel

: Adv . S.C Mopeli

First Respondent's Attorneys

: Govender Attorneys.

Date of hearing

: 05 May 2020 .

Date of judgment

: 25 June 2020.

[1] 1949 (3) SA 1155 (T).

[2] See Erasmus: Superior Court Practice 2ed Volume 2 pDl-69 and the cases cited therein.

[3] See Erasmus: Superior Court Practice 2ed Volume 2 pDl-75 and the cases cited therein.

[4] See KPMG Chartered Accountants (SA) v Securefin Ltd & Another 2009 (4) SA 399 (SCA) at para 65

[5] 2012 (4) SA 593 {SCA} paras 18 -19.

[6] (244/19) [2020] ZASCA 46 (30 April 2020).

[7] 2012 (4) SA 527 (SCA).

[8] 2003 (4) SA 218 (C).

- [9] Described as 'the formal integration of the bride into the bridegroom's family' amongst Swati people in *Mabuza v Mbatha* para 9.
- [10] 2020 (1) SA 41 (SCA).
- [11] T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (2004) at 194
- [12] Para 13.
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