

SOUTH AFRICA / JUDGMENT

Sarah v Mohononi and Others

(22258/2015)

[2022] ZAGPPHC 747 (4 October 2022)

[2022] ZAGPPHC 747

COURT

North Gauteng High Court, Pretoria

BEFORE

Phooko

CASE / FILE NUMBER

22258/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 22258/2015

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

04/10/2022

In

the matter between:

RAMATHOKA

MOLATELO SARAH

Applicant

and

MAILA ELIAS

MOHONONI

First Respondent

MOLOI

DOREEN MOHONONI

Second Respondent

THE

MINISTER OF HOME AFFAIRS

Third Respondent

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] Decades ago, spouses under a customary marriage enjoyed no legal protection in South Africa. This did not affect the status of the marriage and/or the proprietary consequences arising from such marriage if the parties eternally lived together as husband and wife.
- [2] The problem arose only when the commitment of either party to a customary law ended and the other party opted to pursue a different future with another person. For various reasons, things in life happen to change and each individual takes a completely new route in terms of whom they want to be with, committed to, and/or share their

lives with for the remainder of their stay on earth. Consequently, it would occur that one party to a customary marriage enters into a civil marriage with someone else without the knowledge of their customary law spouse.

- [3] The consequences of a subsequent civil marriage by either party with another person were dire, as customary marriages were not legally

recognised. The effect of such civil marriage on the customary marriage was that it dissolved the customary marriage.[1] However, this is no longer the position. The Recognition of Customary Marriages Act 120 of 1998 (“the Customary Marriages Act”) has brought about a legal framework for the recognition of customary marriages.

- [4] This case is about a customary marriage that was concluded between the Applicant and the First Respondent. The Applicant and the First Respondent to date have not registered their customary marriage with the Department of Home Affairs.
- [5] After the customary marriage between the Applicant and the First Respondent, the First Respondent secretly entered into a civil marriage with the Second Respondent.
- [6] Aggrieved by the First Respondent’s move to enter into a civil marriage while the customary marriage subsists, the Applicant approached this Court inter alia seeking a relief declaring the civil marriage between the First Respondent and the Second Respondent null and void ab initio.

THE PARTIES

- [7] The Applicant is Molatelo Sarah Ramathoka an adult female person residing in Mohlabeng village in Bolobedu, Limpopo Province.
- [8] The First Respondent Maila Elias Mohononi, an adult male who also resides at Mohlabaneng village, Limpopo Province.

- [9] The Second Respondent is Moloi Doreen Mohononi, an adult female residing at Mohlabeng village, Limpopo Province.
- [10] The Third Respondent is the Minister of Home Affairs, the executive authority of the Department of Home Affairs who is inter alia responsible for the registration of marriages and whose address for the purpose of these proceedings is that of the State Attorney, 8th Floor Bothongo Heights, 176 Andries Street, Pretoria.

JURISDICTION

- [11] The Third Respondent is inter alia responsible for the registration of civil marriages and has their address of service for these proceedings within the jurisdiction of this Court. Therefore, this Court has the power and competency to adjudicate this matter.

THE ISSUE

- [12] The issue to be determined by this Court is whether the First Respondent's civil marriage to the Second Respondent is void ab initio.

THE FACTS

- [13] On or about the 1st of January 1973, the Applicant and the First Respondent entered into a customary law marriage at Mohlabaneng Village, in Limpopo Province.
- [14] Around 2016, the First Respondent occasionally started to live with the Second Respondent also in Mohlabaneng Village. When the Applicant enquired about the First Respondent's affair with the Second Respondent, the First Respondent advised the Applicant not to worry because he loved her and that he would not leave her. The Applicant believed the First Respondent's assurances of his commitment to her as he lived with her in the house for most of his time.
- [15] On January 2015, the Applicant's son, Peter, asked the Applicant for her identity document for insurance purposes. The Applicant instructed Peter to look for the identity document in her blue bag from her bedroom.
- [16] On arrival in the Applicant's bedroom, Peter inadvertently opened his father's bag and saw a marriage certificate between the First Respondent and the Second Respondent. Consequently, Peter explained the contents of the civil marriage certificate to the Applicant, as the Applicant is illiterate.
- [17] Armed with the knowledge about what civil marriage entailed; the Applicant questioned the First Respondent about his civil marriage to the Second Respondent. The First Respondent confirmed its existence and thereafter apologized to the Applicant.

- [18] According to the Applicant, the First Respondent advised her to keep the civil marriage certificate pending his communication with the Second Respondent in an attempt to find a solution. Such a solution was to be communicated to the Applicant at the end of February 2015 but nothing has materialized. Instead, when the Applicant enquires from the First Respondent about the update as per his promise, the First Respondent gets irritated.
- [19] The Applicant indicated that she has been advised about the repercussions of the existence of the civil marriage between the First and Second Respondents especially as far as the estate is concerned between the Applicant and the First Respondent.
- [20] According to the Applicant, the marriage between the First Respondent and the Second Respondent was done without her “knowledge and consent”. [2] Furthermore, the Applicant alleges that she has been advised that the First Respondent cannot enter into a civil marriage during the subsistence of a customary marriage.
- [21] In light of the foregoing, the Applicant approached this Court seeking an order inter alia declaring that the civil marriage entered into between the First and the Second Respondent is null and void ab initio.
- [22] On 7 March 2022, the Third Respondent entered a notice of intention to defend but later did not participate in the proceedings. This matter was therefore on the unopposed motion roll.

APPLICABLE LAW

- [23] The Customary Marriages Act is the key legal framework that contains most, if not all, of the answers to the present matter. A marriage that is valid and existing in terms of customary law at the commencement of the Customary Marriages Act is recognised as a marriage. [3]
- [24] For a customary marriage to be valid, prospective parties to the customary marriage must both be over the age of 18 years, and consent to be married to each other under customary law. [4] Further, the marriage must be negotiated and entered into or celebrated in accordance with customary law. [5]
- [25] The Customary Marriages Act further provides that “no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 during the subsistence of such customary marriage”. [6]
- [26] Section 8(1) of the Recognition of Customary Marriages Act further provides that “...a customary marriage may only be dissolved by a court of a decree of divorce on the ground of the irretrievable breakdown of the marriage”. This requirement has been confirmed in various judicial precedents. [7]

[27] In addition, section 10(1) of the Customary Marriages Act provides that spouses to a customary marriage “are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961) if neither of them is a spouse in a subsisting customary marriage with any other person”.

[28] Finally, the Customary Marriages Act places an obligation on either spouse to a customary marriage to ensure that their marriage is registered.[8] A customary marriage that was not registered under any law had to be registered within 12 months of entry into force of the Customary

Marriages Act or at any further prescribed time as may be provided for by notice in the Gazette.
[9]

APPLICANT’S

SUBMISSIONS

[29] The Applicant’s submissions were brief and straight to the point.

[30] Counsel *inter alia* argued that a customary marriage exists between the Applicant and the First Respondent. To this end, counsel for the Applicant directed this court to a letter from the local headman stating that the Applicant and the First Respondent got married on 1 January 1973 in accordance with black culture and tradition.[10] Further, the letter from the headman confirms that the First Respondent paid an amount of R120.00 as lobolo for the Applicant.[11] Finally, both family representatives of the Applicant and the First Respondent signed the letter.

[31] Counsel further contended that the subsequent civil marriage by the First Respondent to the Second Respondent during the subsistence of a customary marriage between the Applicant and the First Respondent is contrary to various provisions of the Customary Marriages Act and therefore had to be declared void *ab initio*.

[32] When asked by this Court as to why the Applicant did not register the marriage on her own, the counsel’s response was that the Applicant lives in deep rural areas and is illiterate.

[33] Concerning costs, the Applicant sought no costs against the Respondents.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[34] With regards to the requirements, for the conclusion of the customary marriage, there is no doubt that such marriage exists as per the letter from the headman that confirms payment of lobolo, marriage in terms of black culture and tradition, and signatures of family representatives from the Applicant and the First Respondent’s side. In addition, there was proper service of the notice of motion and the First Respondent and/or Respondents had an opportunity to dispute the existence and/or the non-existence thereof of the said customary marriage. There is therefore no dispute about the validity of the customary marriage between the Applicant and the First Respondent.

[35] Concerning the absence of consent from the Applicant about the First Respondent's unilateral decision to enter into a subsequent

civil marriage to the Second Respondent, the Constitutional Court dealt with the matter albeit in a legal dispute regarding a husband's

decision to enter into a subsequent customary marriage without the consent of his first wife. It was in *Mayelane v Ngwenyama and Another*[12] where the Constitutional Court said:

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.[13]

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 (footnoted omitted).

[36] Even though the aforesaid decision involved a matter that was purely related to a subsequent customary marriage, I find it applicable to the present case where the First Respondent unilaterally decided to enter into a subsequent civil marriage to the Second Respondent without the Applicant's consent and/or consultation in matters that fundamentally affects her dignity, sex life, and personal life. A mere consultation would have sufficed especially entering into a civil marriage with someone who resides in the same village as the Applicant.

[37] Section 8(1) of the Recognition of Customary Marriages Act further provides that "...a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage". This requirement has been confirmed in various judicial precedents.[14] It is common cause that neither the Applicant and/or the First Respondent has taken this step. This also confirms that the customary

marriage between the Applicant and the First Respondent remains valid.

[38] Regarding why the Applicant did not register her customary marriage, this Court is persuaded by counsel that the Applicant is an elder woman who is illiterate and comes from a rural area. Even though the Customary Marriages Act places a duty on her to register the marriage, this is something that she probably took lightly. In any event, section 4(9) of the Customary Marriages Act provides “that failure to register a customary marriage does not affect the validity of that marriage”. In my view, this is also not an issue to dwell on because it was not disputed that a valid customary marriage was concluded. Similarly, in *Thembisile and Another v Thembisile and Another*, the court there did not deem it necessary to deal with the issue of whether the customary marriage was properly registered as it was not disputed that the deceased had entered into a valid customary union with the first applicant. [15]

[39] The law, in particular, section 4(3)(a) of the Customary Marriages Act affords the Applicant to still register her customary marriage. I say so because about three years ago, the Minister of Home Affairs extended the period for registration of customary marriages entered into before, on, or after the commencement of the Customary Marriages Act up to 30 June 2024. [16]

[40] Regarding the First Respondent’s decision to enter into a civil marriage with the Second Respondent during the subsistence of a customary marriage to the Applicant, the Customary Marriages Act is clear in that “no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 during the subsistence of such customary marriage”. [17] This settles the legal issue.

[41] Furthermore, the decision of the Supreme Court of Appeal per my brother Petse AJA (as he was then) with members of the court concurring in *Netshituka v Netshituka and Others* [18] cited the pronouncement in *Thembisile v Thembisile* [19] with approval and said:

“Bertelsmann J held that a civil marriage contracted while the man was a partner in an existing customary union with another woman was a nullity. It

was not argued in this court that *Thembisile* was wrongly decided. It follows that the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a partner in existing customary unions with *Tshinakaho* and *Diana*, was a nullity” (Own emphasis added).

[42] In light of the above, I find myself persuaded and bound by the above decision. Consequently, I conclude that the First Respondent’s civil marriage to the Second Respondent during the existence of his customary marriage to the Applicant is null and void ab initio.

COSTS

[43] The Applicant did not ask for any cost order against the Respondents. Even though the Third Respondent initially intended to oppose the application, nothing was done thereafter.

[44] The matter proceeded on the unopposed motion roll. The Respondents did not waste the court's time. In my view, this Court is justified to depart from the general rule in that the costs should follow the results.[20]

ORDER

[45] I, therefore, make the following order:

- (a) The civil marriage between the First and Second Respondent is declared void ab initio.
- (b) Should the First Respondent wish to remain in the customary marriage with the Applicant, he is to attend, together with the Applicant, to the registration of the customary marriage between them within 60 days of the service of this order.
- (c) The Third Respondent is authorised to register the customary marriage on application by the Applicant, in the absence of the First Respondent, after the lapse of a period of 60 days from the date of service of this order.
- (d) Should the First Respondent no longer wish to remain customarily married to the Applicant, he is to exercise the right to institute divorce proceedings within 90 days of service of this order.
- (e) There is no order as to costs.

M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 October 2022.

APPEARANCES:

Counsel for the Applicant: Adv Mpho Victoria Botomane

Instructed by:

Vele Attorneys c/o Mabote Inc

Counsel for the Respondent: n/a

Instructed by:

State Attorney Pretoria

Date of Hearing:

10 August 2022

Date of Judgment:

04 October 2022

[1] Nkambula v Linda 1951

(1) SA 377 (A).

[2] Para 9 Plaintiff's Particulars of Claims.

[3] Section 2(1) of the Customary Marriages Act.

[4] Ibid 3(1)(a)

(i) and (ii).

[5] Ibid section 3(1)(b).

[6] Ibid section 3(2).

[7] Monyepao v Ledwaba and Others (1368/18)

[2020] ZASCA 54 (27 May 2020) para 18.

[8] Supra fn 2, section 4(1).

[9] Supra fn 2, section 4(3)(a).

[10] Applicant's Founding Affidavit 001-18.

[11] Ibid.

[12]

[13] Paras 72-74.

[14] See for example; Monyepao v Ledwaba and Others (1368/18)

[2020] ZASCA 54 (27 May 2020) para 18.

[15] 2002

(2) SA 209 (T).

[16] Government Notice No.1045 of 2019 (GN1045 GG42622/8-8-2019).

[17] Supra fn 2, section 3(2).

[18] 2011

(5) SA 453 (SCA) at para 15.

[19] 2002

(2) SA 209(T).

[20] President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another
2002

(2) SA 64 (CC) at para 15.

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