

SOUTH AFRICA / JUDGMENT

S.B v B.B and Another (6014/2022)

[2024] ZAECMHC 45 (4 June 2024)

[2024] ZAECMHC 45**COURT**

Eastern Cape High Court, Mthatha

BEFORE

Kunju

CASE / FILE NUMBER

6014/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, MTHATHA)****Reportable****CASE****NO. 6014/2022****In**

the matter between:

S[...]

B[...]

Applicant

And

B[...]

B[...]

First

respondent

DIRECTOR

GENERAL: DEPARTMENT OF

HOME

AFFAIRS

Second

respondent

JUDGMENT

KUNJU AJ:

A.

Introduction

- [1] Broadly speaking, the accomplishment of an African Customary Marriage does not involve one or two people. The strange feature in this matter is that all the role players who were involved when the applicant's first marriage was consummated are all allegedly deceased. The first respondent (respondent) contends that there are rituals and traditions that are performed by certain members of the bride and groom families when a customary marriage is performed. She contends that the failure by the applicant to mention the persons who performed such rituals is not without significance. She is very critical of the applicant's coy description of events which led to the applicant's alleged first customary marriage.
- [2] More concerning is that the alleged first spouse of the applicant is known but the applicant does not know where she currently is. He does not seem to be concerned about that.
- [3] Thorough reading of the papers creates a firm impression that the alleged first spouse is not aware that a case is being mounted by the applicant against the respondent about the existence or otherwise of her alleged marriage.
- [4] The common thread in this matter is that everyone who allegedly played a significant role and who could shed some light about the existence or otherwise of this marriage is deceased. Something is shrouded in the dark.
- [5] Not surprisingly, the applicant alleges that out of the witnesses who have filed affidavits, he is the only person whose evidence should be relied upon. It is in the interests of justice that the facts of this matter be analysed closely. Especially that the issue relating to the existence of a prior customary marriage is only raised during divorce proceedings of the second marriage and when proprietary consequences of the marriage with the first respondent are in issue.

B. The relevant background facts

- [6] The customary marriage between the applicant and the first respondent was consummated during early July 2017. Thereafter and on 27 July 2017 the civil marriage between the applicant and the first respondent was concluded and in turn registered with the offices of Home Affairs – Port St Johns, Eastern Cape.

- [7] Inability to withstand the difficulties of marriage resulted in the applicant and the respondent no longer living as husband and wife, with the result that on 25 October 2021 the applicant instituted divorce proceedings against the first respondent out of the East London Regional Court.
- [8] After he changed legal representatives and acquired assistance and services of his current attorneys he was given an advice that he had a customary marriage with Ms S[...] before she married the first respondent by civil rites and as a result the marriage between him and the respondent was a nullity. This application is sequel to that advice.
- [9] Pursuant to the advice he acquired he decided to withdraw the divorce proceedings and instead instituted the current proceedings out of this court whose objective is to declare the marriage between him and the respondent as a nullity.
- [10] The respondent denies that the applicant was ever married before the conclusion of their marriage.
- [11] This application therefore is about whether the applicant was ever married before he entered into a marriage relationship with the respondent.

C. The applicant's version

[12] The allegations of the applicant are that:

[12.1] on 16 December 2010 at Thombo Location, Port St Johns, she got married to L[...] S[...] (Ms S[...]) of Unit Park Location, Ngobozana Administrative Area, Lusikisiki;

[12.2] her maternal grandfather, Diphotolole Mangqishi had sent emissaries to Ms S[...]’s home in Lusikisiki to negotiate their marriage. The emissaries consisted of: (a) Kholekile Nkomokazi, (b) Thembinkosi Mangqishi and (c) Diphotolole himself. As adverted to above in the introduction, he alleges that all the emissaries are deceased;

[12.3] an amount totalling to R45 000.00 (forty-five thousand rand) was paid towards the lobola of S[...] – including “the customary requirements known as Izibizo[1]”. He states that the bride’s family during the negotiations was represented by S[...] and M[...] S[...] and they are also deceased. Because of what he says is a substantial amount of money that was paid towards the lobola, he says, at their request, M[...] S[...] was handed over to them on the same date of the lobola negotiations. They returned to their home together with Ms S[...] and on the following day they got married according to their traditions and all rituals were performed. She then became the wife of Abathembu and Macirha’s;

[12.4] she was given a marital name of N[...] by his late grandmother M[...] B[...];

[12.5] they have a child with Ms S[...] and her name is P[...] S[...] [2]. The applicant and Ms S[...] encountered some marital difficulties towards the end of year 2011, so much that when she demanded to return to her maiden home he agreed. He states that despite the separation that occurred between them they never lost contact with each other because they have a child together, P[...] [3]. During January 2011 he was employed by Eskom and stationed in East London. Attempts to reconcile with Ms S[...] were made but

unsuccessful. During early December 2011 Ms S[...] became extremely unwell despite various visits to both the medical and traditional

doctors. He finally released her to attend to her traditional training in Kwazulu Natal;

[12.6] her traditional doctor refused any visit by the applicant to his alleged wife since 16 December 2011 when he left her there. Since then, there was total communication breakdown between the two spouses. He was not allowed to receive a telephone call nor an opportunity to enjoy any conjugal rights with his spouse;

[12.7] during December 2012 he met the first respondent (B[...]). She proposed to her a love relationship which was accepted and in turn a love relationship was established with the result that on 14 July 2017 they got married in terms of Customary Law. On 27 July 2017 they concluded a civil marriage at Home Affairs, in Port St Johns, Eastern Cape;

[12.8] when he married B[...] he was not aware that the customary marriage he had concluded with Ms S[...] was an impediment to that of B[...]. He got to know about such an impediment during divorce proceedings against B[...]. This advice was acquired from his current attorneys of record. The attorneys who initiated the divorce with her did not advise him that instead of divorce proceedings he should issue the current proceedings. As such, the current attorneys have taken up the cudgel on his behalf; and

[12.9] for the above reasons, he seeks an order that nullifies his marriage with the respondent on the ground that the marriage is null and void. He contends that a civil marriage concluded during the subsistence or survival of a customary marriage is in law a nullity.

D. The respondent's version

[13] The respondent vehemently disputes the existence of any other marriage with the applicant except hers.

[14] She meticulously highlights gaps in the applicant's evidence of how his alleged customary marriage was conducted. Impertinently, she narrates quite persuasively why the names of the persons who could have played important roles during the consummation of the alleged customary marriage with Ms S[...].

[15] She contends that the applicant's emissaries and the family expressly stated during lobola negotiations and Utsiki ceremony that the first respondent was his first wife. She states that at the time she stayed with the applicant as husband and wife he had never mentioned Ms S[...] as his previous wife. She states that since she got to be part of the B[...] family and got to

talk with the family members throughout the years of the existence of the marriage between them, she was never told about the previous marriage of the applicant – instead the mother of the applicant (mother in law)

she ululated in praise during the Tsiki ceremony stating that it was her first time to welcome a wife at her homestead.

[16] She remarks and observes that all persons who allegedly played some roles in the applicant's alleged first customary marriage are all deceased, leaving the applicant as the only person who can attest about the alleged existence and consummation of the customary marriage between him and Ms S[...]. She states that this idea about a prior marriage came about after she delivered her plea in the divorce proceedings and claiming her 50% share being a consequence of their marriage regime.

[17] The respondent contends that through these proceedings the applicant is trying to avoid the proprietary consequences of the marriage she concluded with the applicant. In this regard she refers to two confirmatory affidavits, one being that of a Traditional Leader (the Chief) on whom the jurisdiction of the homestead of the applicant falls and the second one being that of a long standing neighbour at the applicant's ancestral homestead. They both deny the existence of any other marriage except the one between the applicant and the respondent.

E. The issue

[18] The issue here is factual in nature. It is whether there was ever a marriage relationship between the applicant and Ms S[...] before he married the respondent.

F. The Court hearing on 23 May 2024

[19] When this opposed application was called only the applicant was represented. There was no appearance on behalf of the respondent. There was equally no heads of argument prepared on behalf of the respondent. I was equally ready to hear the matter notwithstanding the said shortcomings.

[20] When Mr Baceni, who appeared for the applicant had confirmed that the applicant was ready to proceed with the matter, I allowed him to argue the matter.

[21] During the course of argument I enquired from Mr Baceni if the alleged first wife of the applicant knows about these proceedings and his response was that the whereabouts of the first wife are not known by the applicant and as such is not aware that there are these proceedings.

[22] After engaging Counsel about some problems I encountered in this matter a draft order referring this matter to oral evidence was presented to me. It did not have the conventional terms relating to procedural steps before the hearing of oral evidence. I adjusted it accordingly as it will appear below.

G.

Analysis

[23] The high watermark of the argument adopted by the applicant seems to be that his evidence should be accorded more weight by the court than that of the respondent. To show this, in paragraph 12 of the applicant's heads of argument, the following submission is made:

"Further to the above, the fact of the first marriage lies purely within the knowledge of the Applicant."

[24] The following to me, are some of the features that render the version of the applicant curious and mind boggling:

[24.1] the applicant became aware of the ramifications of the alleged previous customary marriage when confronted with consequences of her marriage with the respondent in the middle of divorce proceedings and after the filing of a plea of the respondent.

[24.2] all persons who played major roles both in the alleged lobola negotiations or during the consummation of the marriage ceremony (utsiki) are either deceased or their names are not mentioned at all.

[24.3] the Chief of the area and the neighbour of the applicant at his locality or village deny the existence of the alleged marriage.

[25] I am unable to ignore what the respondent alleges in paragraphs 4, 7.1, and 7.2 of her affidavit. In relevant parts, in paragraph 4, the respondent alleges:

"... Having known the applicant since 2013 until we got married in 2017, it is a concoction and recent fabrication to evade the legal consequences of divorce that he was previously married."

... The applicant fails to appreciate that by virtue of us having been married and having been also an active member of his family for

not less than five years, I am also part of his family and thus I have acquired all relevant information surrounding the family. ..."

[25.1] In sub paragraphs 7.1 and 7.2 she says:

"7.1 I dispute the averment made in this paragraph. I am the applicant's first wife. Despite knowledge based on my own background check which was also confirmed by the applicant himself that he was never married before I got into the picture, this was clearly stated by the elders from my family who had handled my lobola negotiations (emissaries), those being Sicelo Magungxu and Fanele Magungxu. This was discussed as part of the lobola deal between the two families agreed on our marriage. The applicant's family was represented by Thanduxolo Mafanya, Mluleki Bangiso Andile Nkomokazi and Songezo Dliwako."

7.2 As I have indicated above that I did my own background check as well, I further confirmed that the applicant was never married to anyone before me when I joined his family as a member. I was informed by my grandmother in law, sisters in law and as well as the close family relatives that I was the first wife. It is highly inconceivable that the emissaries who negotiated lobola with

my family on his behalf did not know of the alleged first marriage. I say so because none of the emissaries confirms the first marriage the applicant alleges to exist. One of the emissaries in my case was Mluleki Bangiso who is a biological brother of the applicant's mother. He (Mluleki) is a noticeable absentee in this application and whose confirmatory affidavit to the applicant's case would have given weight."

[26] The absence of any form of evidence from the other spouse of the alleged previous customary marriage – even by way of a confirmatory affidavit is a worrying factor. It worries me more in the circumstances of this case.

[27] Apart from anything else, I am unable to characterise the disputes raised by the respondent as:

[27.1] not bona fide on material aspect of the case;

[27.2] uncreditworthy denial of a palpably implausible version; and

[27.3] being farfetched or fictitious.

[28] Rule 6(5)(g) provides:

"Where an application cannot properly be 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 afore going, 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 for 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 pleadings or definition of issues, or otherwise."

[29] In *MEC for Health: Eastern Cape v Mbodla* (449/2013) [2014] ZASCA 60 (6 May 2014) in paragraph 7 the court said:

"Rule 6(5)(g) deals with this situation as is apparent from its opening words, which are:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision.'

This Court has confirmed that the powers this rule vests in the court are extremely broad and should be exercised to ensure that matters are decided justly and expeditiously. They are usually exercised because of the presence of disputes of fact in the papers before the court, but the rule is not confined to that situation. If a court is unable to make a just decision because the parties have failed to place sufficient information before it to enable it to do so, it may in an appropriate case, exercise its powers under the rule to give directions that will enable the deficiencies to be remedied and a just decision to be rendered." (my underlining).

- [30] In general terms, it can be said that oral evidence in terms of the subrule can be allowed if there are reasonable grounds for doubting the correctness of the allegations made by the applicant (D1 – 71: service 20: 2022: Erasmus). In this matter I also find myself in that position. I have serious reservations about the correctness of the allegations made by the applicant. With the available evidence I am unable to render a just decision.
- [31] My finding as stated in the preceding paragraph has made me believe it appropriate to refer this matter to hearing of oral evidence. I consider the dispute in issue to be very critical between the parties, especially the respondent who is innocent and likely to be prejudiced by the new revelations brought forward by the applicant.
- [32] It cannot be said without more that because the applicant states that he previously married, I should simply accept that as correct. I have looked at the applicant's version against other dimensions and allegations in the matter. The evidence presented by the applicant needs to be tested in open court. My view is that where a fundamental right is threatened or the evidence is in doubt or is not fully ventilated, as in this case, referral to oral evidence in my view is the correct route to take. I see no reason why rule 6(5)(g) may not be invoked in such circumstances. The resolution of this dispute is in any event important to both parties in this matter. It may also help Ms S[...] acquire knowledge about her rights or benefits arising from the alleged previous marriage. The applicant is not likely to be troubled by the involvement of Ms S[...] in any way or form.
- [33] For all the above reasons the following order shall issue:
1. The issue of whether or not the applicant married L[...] S[...] before she got married to the respondent is referred to oral evidence on a date to be arranged with the registrar.
 2. Unless this court otherwise directs, in relation to the issue referred to oral evidence:
 - 2.1 the applicant and the first respondent will be entitled to call any witness who deposed to any affidavit in the application proceedings;
 - 2.2 the applicant and the first respondent are obliged to make available for cross-examination such witnesses who deposed to affidavits in these proceedings to the extent that such party persists in seeking to place any reliance on that person's evidence in the affidavits;
 - 2.3 the applicant and the first respondent are entitled to call any further witnesses who were not deponents to affidavits in these application proceedings:
 - 2.3.1 provided that such party has at least thirty court days before the date of the hearing of the oral evidence served on the other party a statement of the evidence in-chief to be given by such person;
 - 2.3.2 but subject to the court, at the hearing of the oral evidence, permitting such further witnesses to be called notwithstanding that no such statement has been served in respect of his or her evidence;

2.4 the applicant and the first respondent may subpoena any witness to give evidence at the hearing or to furnish documents whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence;

2.5 that a party has served a statement in terms of sub-paragraph 2.3 above or has subpoenaed a witness shall not oblige such party to call the witness concerned;

2.6 Uniform Rule 35 will be applicable to the discovery of documents on the issue referred to oral evidence.

3. The incidence of costs, including any costs arising from the hearing of this application on 23 May 2024, will be determined after the hearing of oral evidence.

V. KUNJU

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv Baceni (heads of argument prepared by Adv Mzileni)

Instructed by:

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Mthatha S

For the respondent : No appearance.

Attorneys

: Ximbi Ncolo Attorneys

94 nelson Mandela Road

Mthatha

Heard:

23 May 2024.

Delivered:

04 June 2024.

[1] One is unable to establish from the papers what this Izibizo is.

- [2] I have noted that the child's surname is that of Ms S[...]: traditionally this has other permutations.
- [3] Strangely for purposes of this application she is not contactable.
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