

SOUTH AFRICA / JUDGMENT

Sikhosana v Kabini NO and Others (2021/59067) [2023] ZAGPJHC 889 (8 August 2023)

[2023] ZAGPJHC 889

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Marais

CASE / FILE NUMBER

2021/59067

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO: 2021/59067

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

08/08/23

In the matter between:

SIKHOSANA,
TSEKO GOGFREY
APPLICANT
And
KABINI, MARRY-JANE
NONHLANHLA N.O.
FIRST
RESPONDENT
MINISTER OF HOME
AFFAIRS
SECOND
RESPONDENT
MASTER OF THE HIGH

COURT
THIRD
RESPONDENT

JUDGMENT

D MARAIS AJ:

BACKGROUND

- [1] The applicant, Mr Tseko Godfrey Sikhosana, applies for an order declaring that a valid customary marriage was concluded on or about 21 March 2021 between himself and Ms Nomfundo Lucia Kabini, who passed away on 12 July 2021 due to COVID 19 related complications. He also seeks an order in this regard against the second respondent, the Minister of Home Affairs, for an order that the marriage be registered in terms of the Recognition of Customary Marriages Act, Act 120 of 1998.
- [2] The first respondent, Ms Marry-Jane Nonhlanhla Kabini, is the mother of the deceased and was cited in her capacity as the executor of the deceased's estate, having been appointed as such by the Third Respondent. The applicant also seeks an order against the third respondent, the Master of the High Court, compelling the removal of the first respondent as the executor of the estate, and an order against the first respondent to account for all funds received in her capacity as the executor.

THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 of 1998

- [3] To succeed with the main relief sought in this matter, the applicant had to show that the alleged marriage was entered into in accordance with the provisions of the Recognition of Customary Marriages Act ("RCMA").
- [4] In terms of the RCMA a "customary marriage" is defined as a marriage concluded in terms of customary law, and "customary law" means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people.
- [5] "Lobolo" is defined as means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.
- [6] Section 2(2) of RCMA a customary marriage entered into after the commencement of the Act, which complies with the requirements of the Act, is for all purposes recognised as a marriage.
- [7] Section 3(1) of the RCMA provides as follows:

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.
- [8] Section 4 of the RCMA makes provision for the registration of customary marriages, but in terms of section 4(9) the failure to register a customary marriage does not affect the validity thereof.
- [9] The issue in the present matter is whether the applicant and the deceased entered into a marriage in accordance with customary law, it being common cause that the parties were older than 18 years of age and agreed to be married.

COMMON CAUSE FACTS

- [10] The applicant and the deceased became romantically involved during 2020, having become acquainted on Facebook and later having started dating each other in person. After the relationship developed further, they decided to reside together at the deceased residence. At some point the applicant and the deceased decided to get married. When this exactly happened is in dispute, but the dispute is of no moment.
- [11] On or about 28 February 2021, the applicant's family sent a letter to the deceased's family, indicating that they wished to pay the deceased's family a visit on 21 March 2021 at about 9h00 for lobolo negotiations, and expressed the wish that they be welcomed.
- [12] A delegation of the applicant's family indeed went to the deceased's family in Springs, Gauteng, to meet with the deceased's family for purposes of lobolo negotiations.
- [13] The applicant also states that the purpose of the meeting was also "to conclude the customary marriage", a statement which is heavily contested by the first respondent. I shall revert to this dispute, which is the central issue in the present matter.
- [14] The lobolo negotiations were successful and it was agreed that the applicant's family would pay the equivalent rand value of 7 cows (i.e., 7 x R10 000.00) to the deceased's family plus one cow to the value of R12 000.00 to the first respondent (being the prospective mother-in-law). It was agreed that R30 000.00 would be paid immediately (which was indeed done) and that there was a balance to be paid in due course of R52 000.00.
- [15] The successful lobolo negotiations were recorded in writing and signed by the families. The written minutes indeed reflect that payment of lobolo was agreed upon.

- [16] It was common cause that the partial payment of the lobolo would not invalidate a possible marriage.
- [17] It was also common cause that the marriage was to be concluded in accordance with Ndebele tradition, the deceased's family being from Ndebele tradition, while the applicant is from Sotho heritage.
- [18] After the successful lobolo negotiations some festivities ensued, during which the deceased, initially dressed in Ndebele dress, changed her dress to shweshwe[1] (alleged to be Sotho traditional dress), such dress having been presented to her during the festivities by the female members of the applicant's family.
- [19] During these festivities the applicant and the deceased exchanged rings, and on all accounts the event was a joyful one.
- [20] After this event, the applicant and deceased stayed together at her residence, until the deceased's untimely demise in July 2021.
- [21] It is common cause that the deceased was buried by her family due to financial constraints on the part of the applicant and that she was buried in a shweshwe dress (as opposed to a traditional Ndebele dress).

THE DISPUTE BETWEEN THE PARTIES AND THE APPLICATION OF THE PLASCON-EVANS RULE

- [22] The applicant's version was that the negotiations on 21 March 2021 had the purpose of lobolo negotiations and the conclusion of the marriage.
- [23] This was disputed by the first respondent, who drew a distinction between lobolo negotiations and the conclusion of the marriage. The first respondent stated that in accordance with Ndebele tradition, a lobolo meeting serves as an introduction of the families to each other and the negotiation of lobolo. A marriage is allegedly never concluded during lobolo negotiations or even on the same day. Successful lobolo negotiations are always followed up by another meeting when the marriage is concluded or celebrated, which is also the occasion when the bride is handed over[2] to the bridegroom's family. Accordingly, the first respondent states that it was never agreed that the event would be a marriage

celebration, nor was the bride handed over as is customary.

- [24] As the applicant has elected to institute proceedings by way of notice of motion and has not sought an order referring this matter for the hearing of oral evidence or by way of trial, the Plascon-Evans rule[3] (which is in South Africa universally accepted as the applicable approach to resolve factual disputes in motion proceedings in which final relief is sought). In terms of this rule disputes of fact in motion proceedings must be determined on the basis of the respondent's

version, unless such version is of such a nature that it does not raise a real, genuine or bona fide dispute of fact. If the court is convinced of the inherent credibility of the applicant's averments, it can proceed on the basis of the applications version. There are circumstances in which allegations or denials are so far-fetched that they can be rejected out of hand.

[25] These are the accepted principles I am obliged to apply in the present matter in relation to factual disputes.

[26] It must be noted at the same time that, apart from the resolution of the factual issues in this matter (applying the Plascon-Evans rule), there are substantive law issues which are relevant to this matter, even if the first respondent's version is the one to be accepted.

MARRIAGE IN ACCORDANCE WITH CUSTOMARY LAW AND THE NOTION OF LIVING CUSTOMARY LAW

[27] The RCMA requires the marriage to be entered into in accordance with customary law, which equates to a marriage in accordance with the relevant custom. As indicated above, "customary law" is defined as "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people".

[28] Against the background of the fact that in the colonial and apartheid eras in South Africa the development of customary law was stymied (at least as far as official recognition by government and the courts is concerned), it is now trite law that customary law is a vibrant system of law, which constantly evolves according to the needs of a particular community. These changing needs have a variety of sources, which include religion, urbanisation, industrialisation (including mining), demographic changes, poverty experienced by males in an urban setting, change in gender roles in modern society, the development of a more empowered class of females and constitutional considerations such as gender equality, rights of dignity and freedom of association.

[29] In my view the phenomenon of cohabitation before marriage (with or without the approval of the couple's relatives), which has during the recent past become quite common, must have a profound influence on the degree to which traditional customs must be adhered to, to result in a valid marriage. This contributes to a greater degree of flexibility in this regard.

[30] It is indeed also now trite law that customary law is characterised by flexibility.

[31] In *MM v MN and Another*[4] it was held that paradoxically, the strength of customary law — its adaptive inherent flexibility — is also a potential difficulty when it comes to its application and enforcement in a court of law. This accords entirely with my experience in this matter.

[32] In *Mbungela and Another v Mkabi and Others*[5] the following was held:

“It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms.

- [5] The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned.
- [6] As this court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society.
- [7] Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.”
- [33] Consequently, it was incumbent on the applicant to place admissible evidence before the court regarding the requirements of a Ndebele customary marriage, as currently practiced.
- [34] However, the applicant made no attempt to place any such evidence before the court and made certain statements in this regard that are highly questionable.
- [35] During argument, counsel for the applicant was invited to address the court on the requirements of Ndebele custom, an invitation counsel declined. Instead, counsel resorted to a terse statement which can be paraphrased by the statement that “there was a customary marriage, and that is it!” This approach failed entirely to advance the applicant’s case, or to assist the

court in making a finding on a subject which, on all accounts, is a difficult one to decide.

THE REQUIREMENT OF A MARRIAGE CELEBRATION

- [36] There is nothing to gainsay the first respondent’s version that that in terms of traditional Ndebele custom the lobolo agreement is made at the bride’s family home, while the marriage ceremony (and the handing over of the bride) is to occur at the groom’s home. In this regard the first respondent’s version is in accordance with recorded authority.[6]
- [37] This differs from the Sotho – Tswana tradition where the wedding is celebrated at the bride’s home, where the lobolo discussions and agreement takes place.[7]
- [38] It appears that in Sotho-Tswana tradition the lobolo negotiations and the celebration of the marriage were somewhat intertwined, whilst in terms of the Ndebele tradition there was a degree of separation.
- [39] However, it is highly doubtful that in terms of current living customary law, a requirement that the marriage celebration should of necessity take place on a day different from the lobolo negotiations, and that it should take place at the groom’s residence, has any legal force. It is clear to this court that in terms of living customary law if the parties agreed (either expressly, or tacitly) to consummate the marriage by way of a marriage celebration on the same day as the lobolo negotiations, at a place wherever they decide, this will result

in a valid customary law marriage.

- [40] In this regard the formalism relied upon by the first respondent is, with respect, antiquated and out of step with modern times. It is also contrary to the notion of customary law as a vibrant, flexible system, which evolves continuously.
- [41] In this regard, it has been held that if the parties waived one or the other requirement of a traditional marriage, the lack of compliance with such requirement will not invalidate the marriage.[8]
- [42] I am mindful of the fact that in the context of customary law, one should be careful not to transplant common law notions into customary law. That having been said, I am of the view that the use of the legal concept of waiver should as far as possible be avoided in this context. Our law has strict requirements before a waiver can be relied upon, such as that the person waiving must have done so with full appreciation of his rights. Furthermore, waiver is a one-sided legal act, which is not apposite in the context of a

marriage, which requires a bilateral legal act.

- [43] In my mind the only way that waiver can be brought into account, is where both parties waived a certain requirement, which in essence means that the parties practically agreed to a deviation from strict compliance with a traditional norm, in favour of a flexible or even symbolic form of compliance. This agreement, which will often be a tacit one, does not require proof that the parties had full knowledge of the traditional requirements and purposefully agreed not to follow them. It will suffice if a court can hold on a balance of probabilities that the parties agreed to a form of compliance other than strict compliance with a relevant tradition. The question is also not whether there was “substantial compliance”[9], but whether there was compliance to the degree agreed upon by the parties, having regard to the flexible nature of the inquiry.
- [44] The question as to whether there is a threshold to agreed non-compliance, beyond which the result will be non-compliance with traditional custom and a failure of the intended and purported marriage, is one that goes hand in hand with the flexibility built into the enquiry, is a difficult question which this court is fortunately not called upon to decide.

THE NDEBELE CUSTOM OF A MARRIAGE CELEBRATION AND COMPLIANCE THEREWITH IN CASU

- [45] It must be accepted on the papers before the court that it is a requirement of Ndebele custom that there must be a marriage celebration, distinct from the conclusion of a lobolo agreement.
- [46] I hold that the parties are free to agree that such celebration can take place on the same day as the lobolo negotiations, and that the celebration does not necessarily have to be at the groom's residence. I hold that as long as there was a marriage celebration, the requirement of the custom has been met.

[47] I also hold that with the possible exception of Sotho-Tswana tradition (where the groom resides with the bride at her family residence until the first child is born) the conclusion of a lobolo agreement is not to be equated to the conclusion of the marriage itself. Lobolo and the conclusion of the marriage has always been distinct phenomena.

[48] I also hold that the handing over of the bride, as a substantive requirement for the conclusion of a valid customary marriage, no longer applies.[10]

THE RESOLUTION OF THE FACTUAL DISPUTE REGARDING THE MARRIAGE CELEBRATION

[49] The question in this matter is whether the events after the lobolo negotiations amounted to an agreed marriage celebration or not.

[50] In this regard the parties give conflicting versions. The applicant suggests that the meeting held on 21 March 2021 was both for purposes of lobolo negotiations and the marriage celebration.

[51] This statement is not supported by the letter that was sent to the deceased's family, which merely stated that the purpose of the meeting was to discuss lobolo. It is also not supported by the written record of the agreement, which merely recorded the lobolo agreement. I am of the view that, given the cultural importance of the lobolo agreement, it is not surprising that these documents are confined to the issue of lobolo, and that the court should not place undue importance on this fact.

[52] Ironically (the applicant having accused the first respondent of manufacturing evidence regarding the relevant custom) it appears to me that the applicant's narrative of the alleged marriage celebration, which he described as in accordance with Ndebele custom, was rather contrived.

[53] I have no reason to reject the first respondent's version that the pointing out of the bride amongst three blanket-covered maidens, relied upon by the applicant, is a ritual associated with lobolo negotiations and not the celebration of the marriage. The applicant himself also seems to place this in the context of lobolo negotiations.

[54] The applicant's statement that after the lobolo negotiations marriage celebrations ensued at the deceased's family residence "as is part of Ndebele tradition" falls to be rejected out of hand. There is no basis on the papers and authority for such statement. I refer to my finding above, that the place where the marriage is celebrated is in terms of substantive law not a requirement for a valid customary marriage.

[55] Furthermore, the applicant stated that these marriage celebrations entailed that that the deceased's family welcomed him into their family, "as is the tradition". This statement is also entirely unfounded. In terms of Ndebele tradition, quite the opposite is the custom; the bride is supposed to be accepted into the groom's family and is supposed to become part of his family.

- [56] The applicant relies on the fact that rings were exchanged as proof of the marriage celebration. The first respondent's version was that the rings were exchanged as part of a promise to marry and did not signify a marriage. Although the exchange of rings can obviously be part of an undertaking to marry, I am of the view that in the context of this matter the exchange of rings, on a balance of probabilities, is indicative of a marriage ceremony, rather than a promise to marry.
- [57] It is common cause that during the celebrations the deceased, initially having dressed in Ndebele attire, were presented with a shweshwe dress by the applicant's family and that she then dressed herself in this dress. The applicant stated that this signified the deceased's acceptance into his family. This is also disputed by the first respondent on the basis that the events on the day in question was not a celebration of marriage, but merely a celebration of successful lobolo negotiations. She stated that the way the parties dressed related to the lobolo celebrations. I am, however, of the view that this fact also supports the existence of a marriage ceremony and the symbolic installation of the deceased into the family of the applicant, as is the tradition.
- [58] The applicant also stated that the deceased was handed over to him by her father as part of the marriage ceremony, after which rings were exchanged. This is disputed by the first respondent, who stated that she "could not remember" the Kabini delegates ever handing the deceased over to the family of the applicant. In this regard, the first respondent's evidence was rather tentative. One would have expected her to be emphatic on this issue, which on her version was very important to her. In this regard, the first respondent's evidence is questionable.
- [59] The fact that the applicant and the deceased cohabitated after this ceremony creates a presumption of a marriage.[11] However, the first respondent's evidence is that during May 2021 she confronted the applicant and the respondent about the cohabitation whilst not being married, and that they "clarified" that the applicant was living with the deceased as a mere tenant (and not as husband), at the same time presenting a signed lease agreement. The first respondent stated that it was then realised that the applicant and the deceased were not living together as husband and wife, as it was thought. The applicant disputes that this event ever happened and states that the first respondent obtained the signed lease after the death of the deceased. However, in his replying affidavit the applicant wilfully declined to disclose the reasons for the existence of the lease agreement – a fact that does not advance his case. However, that having been said, it is common cause that prior to the lobolo negotiations the applicant and the deceased were in a romantic relationship and were living together. After the lobolo negotiations, they continued to live together. The notion that the applicant was a mere tenant at the deceased's house falls to be rejected out of hand. Why the applicant did not wish to state the reasons for the existence of the lease agreement is somewhat mystifying. Even if it is accepted that the lease agreement was concluded, it would not detract from the fact that the parties were cohabitating at least in a romantic relationship.

- [60] I am of the view that the fact that the applicant and the respondent had already been cohabitating at the time of the lobolo negotiations also diminished the degree of compliance with the requirement of a marriage celebration and / or the handing over of the bride.
- [61] It is important to note that it was common cause that for financial reasons, the applicant did not conduct the funeral, but that the deceased's family was in control of the arrangements. It is common cause that the deceased was buried by her family in a shweshwe dress, and not traditional Ndebele dress. This the applicant attributed to the fact that it was recognised by the deceased's family that they were married. The first respondent states that this was done in recognition of the fact that the deceased was about to get married into a Sotho family. I find the first respondent's version in this regard highly questionable and I hold that this fact creates a strong probability in favour of a valid marriage having been concluded, with had the cultural effect of making the deceased part of the applicant's family.

CONCLUSION

- [62] On the common cause facts and that portion of the first respondent's version which can be accepted as reliable, the following can be accepted:
- [62.1] The deceased was a professional person with a tertiary education living in an urban setting, occupying a position at one of the major banks.
- [62.2] Prior to her death, she became romantically involved with the applicant and allowed him to move in with her.
- [62.3] The parties are older than 18 years and decided to marry.
- [62.4] Lobolo was agreed upon between the families on 21 March 2021 and was partially paid on the same day.
- [62.5] It is common cause that the partial payment of lobolo could not invalidate the marriage.
- [62.6] Festivities ensued and on all accounts the event was a joyful occasion.
- [62.7] The first respondent's denial that a handing over of the bride took place, was a half-hearted denial.
- [62.8] The parties exchanged rings during the events.
- [62.9] During the ceremony, the applicant's family presented the deceased with shweshwe dress, associated with the applicant's Sotho tradition, which she put on, instead of her Ndebele dress.
- [62.10] After the ceremony, the parties continued to cohabit until the deceased's untimely death.
- [62.11] The deceased was buried by her family in a shweshwe dress, as opposed to a Ndebele dress.

[63] Having regard to these facts, I am of the view that on a balance of probabilities, the parties (including the families) did intend the celebrations to include a marriage celebration and that a marriage was indeed concluded and / or celebrated on the day in question.

THE ISSUE OF THE FIRST RESPONDENT'S REMOVAL AS EXECUTOR

[64] The applicant also sought an order in terms of which the Third Respondent is compelled to remove the first respondent as the executor of the deceased's estate.

[65] No case was made out for the order sought.

[66] The applicant is seeking the first respondent's removal as executor with a view on himself being appointed as executor.

[67] It must be emphasised that on the papers before the court, the applicant is not a first and proper person to be appointed as an executor. The first respondent lead evidence that the applicant stole the sum of R40 000.00 from the deceased's account after her death. The applicant intentionally declined to respond to this allegation, and the allegation stands uncontroverted.

ISSUE OF COSTS

[68] The conduct of the applicant in this matter was unacceptable. He failed to lead evidence regarding Ndebele custom, as he was supposed to do. It is really through chance that he will be successful with his main relief. One may even go further to state that he will be successful despite certain untruthful statements. He was entirely unhelpful during argument. It can be fairly stated that the applicant will be successful in the main relief sought, despite the lack of effort on his part. There was evidence that he stole

money belonging to the deceased's estate, which he failed to refute.

[69] Under the circumstances, in the judicial exercise of the discretion I have on costs, I am of the view that the applicant should be deprived of his costs.

[70] The first respondent is also not entitled to a costs order on the main issue, not being successful in her opposition in this regard. However, given the background of Ndebele custom, I cannot find that the first respondent's opposition to this application was unreasonable.

[71] With regards to the unsuccessful application for her removal as the executor, the first respondent is entitled to some costs. I am of the view that it will be just and equitable for the applicant to pay 25% of the first respondent's costs in this application.

ORDER

[72] Consequently, the following order is made:

[72.1] It is declared that a valid customary marriage was concluded and celebrated between the applicant and the deceased, Nomfundo Lucia Kabini on 21 March 2021.

[72.2] The second respondent is ordered to register the customary marriage referred to in paragraph 71.1 above.

[72.3] The applicant's application for an order compelling the third respondent to withdraw the first respondent's appointment as executor to the estate of the late Nomfundo Lucia Kabini, and the ancillary relief sought, is dismissed.

[72.4] No costs order is made in favour of the applicant.

[72.5] The applicant is ordered to pay 25% of the first respondent's costs of this application.

DAWID MARAIS

ACTING JUDGE OF THE HIGH COURT

8 August 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded

to CaseLines. The date of this judgment is deemed to be 8 August 2023.

Appearances:

Appearance for Plaintiff:

ADV MD MATSETELA

Instructed by:

JULIANA SOCKIWA ATTORNEYS

Appearance for Defendant:

ADV PW SPRINGVELDT

GW MASHELE ATTORNEYS

Date of hearing: 9 May 2023

Date of Judgment: 8 August 2023

[1] Also known as "sejeremane" (literally "German") in the Sesotho language, named after the 19th century German and Swiss importers of the "blaudruck" fabric which was adopted and became an intrinsic part of Black South African culture.

[2] In modern times, symbolically.

[3] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984

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- [3] SA 623 (A)
- [4] MM v MN and Another 2013
- [4] SA 415 (CC)
- [5] Mbungela and Another v Mkabi and Others 2020
- [1] SA 41 (SCA) par
- [6] Bekker Seymour's Customary Law in Southern Africa (5ed) 112 - 113
- [7] Bekker Seymour's Customary Law in Southern Africa (5ed) 113 - 114
- [8] Mbungela and Another v Mkabi and Others 2020
- [1] SA 41 (SCA)
- [9] A notion that has fallen in disfavour in general.
- [10] Mabuza v Mbatha 2003 (4) SA 218 (C); LS v RL 2019 (4) SA 50 (GJ).
- [11] Mbungela and Another v Mkabi and Others - 2020 (1) SA 41 (SCA) par 25
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