
SOUTH AFRICA / JUDGMENT

S.J.M v L.I.M (Appeal) (A31/2019) [2020] ZAMPMHC 46 (21 October 2020)

[2020] ZAMPMHC 46

COURT

Middelburg High Court, Mpumalanga

BEFORE

H.C. Jansen van Rensburg, H. Barnardt

CASE / FILE NUMBER

A31/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

MIDDELBURG

Case : A 31 / 2019

In the matter between

S[...] J[...] M[...]

APPLICANT

AND

L[...] I[...] M[...]

RESPONDENT

APPEAL

JUDGEMENT

THE COURT

INTRODUCTION

[1]. The applicant and the respondent agreed in writing that this appeal could be adjudicated on the papers before the honourable court.

[2]. The applicant and the respondent were married by customary law on 16th August 1998 at Embalenhle Mpumalanga in community of property.

[3]. On 20th January 2016, the respondent instituted legal proceedings for a divorce against the applicant. Following a decree of divorce the court a quo made the following order –

[3.1.]. A decree of divorce was granted.

[3.2.]. That the estate be divided between the applicant and the respondent.

[3.3.]. That the applicant was ordered to make payment in the amount of R 10 000 – 00 per month to the respondent until death or re-marriage.

THE ISSUE TO BE DETERMINE

[4]. Whether the applicant and the respondent were married under customary law?

THE

FACTS

The respondent

[5]. The respondent alleges that she was married to the applicant under customary marriage since 16th August 1998 until being divorced from the applicant.

[6]. The applicant admitted the holding of the ceremony referred to as isimanje custom and that there was lobola negotiations. The applicant submits that the customary marriage was not concluded in terms of the Ndebele tradition. The applicant submits that the respondent did not include a prayer for divorce whereby the court a quo should declare that a valid customary marriage existed between the applicant and the respondent.

[7]. In short the applicant based his grounds for appeal on the non-existence of the customary marriage between himself and the respondent wherefore –

[7.1.]. The decree of divorce by the court a quo stand to be set aside.

[7.2]. That there was no proof of the customary marriage as there was no certificate of registration of the customary marriage.

[7.3.]. That where the decree of divorce and to distribution of the assets of the applicant, as alleged not to have been married to the respondent, would cause the business of the applicant to cease.

[7.4.]. That the decree of divorce in the court a quo would mean that the respondent would be awarded half of the estate and that the payment of further maintenance would be unfair to the applicant.

[7.5.]. That the court a quo failed to properly appoint a liquidator.

Respondents witnesses

[8]. Witnesses testified on behalf of the respondent during the proceedings in the court a quo.

[8.1.]. Mr S.C. P[...] is the respondents' uncle. The witness was the drafter of the first lobola agreement and that the 'isimanje ceremony' was performed for the respondent who was from the Zulu ethnic group. The ritual of slaughtering a cow and sheep was done by the elders which symbolising the 'joining of the applicant and the respondent. Gall was spilled on both parties heads and toes which also symbolised the joining of the applicant and the respondent. The meat was cut and divided and gifts in the form of blankets were handed over which symbolised the respondent was not the wife of the applicant. The applicants' obligation to the family of the respondent was completed and nothing was outstanding regarding the lobola and the customs to be performed.

[8.2.]. Ms J.L. P[...] is the aunt of the respondent. The witness welcomed the respondent to her home to assist the respondent in the ceremonies to follow. The witness confirmed the ceremonies and the give to blankets, spilling of the gall which symbolise the custom of the bride-to-be and that the respondent was taken to the applicants family for the handing-over ceremony to be concluded.

[8.3.]. Ms P.N. M[...] is the respondents younger sister. She was aware of the customary celebration of 'isimaja' and she was present where the lobola was paid. The witness assisted the respondent but did not personally saw the sprinkle of the gall but she saw the gall bladder hanging from the blanket of the respondent, saw the 'kiss' and the cattle.

[8.4.]. Me L.I M[...] testified that there was no need for a marriage certificate as the parties were married under customary law. The applicant made payment of lobola on 16th August 1998 and 1 January

2002. The witness confirmed the ceremony called 'isimanje'

was performed in terms of the Ndebele tradition. The rituals and the customs to hand over the respondent to the applicants family was concluded. The respondent tried to register the marriage but the applicants presence was required for the registration to be

completed. The respondent had to look after the applicants grandchildren for many years, represented the late mother-in-law in customary celebrations which a 'girlfrien ' was not allowed to do.

[8.4.]. Mr J.K. Masongo is the caretaker chief of the Ndebele chieftaincy in Embalenhle Mpumalanga since 2009. The witness testified about the customs to confirm a customary marriage. Thereafter the lobola negotiations would follow, the ceremonies of isimanje and Ukuhlambisa would be performed. The respondent would not be allowed to attend to certain ceremonies if the respondent was not married to the applicant. Even where the full lobola was not paid at the time of the marriage, this did not mean that the respondent was not the wife of the applicant. The witness testified about the ritual that was performed and the gifts of blankets were handed to the family of the husband (the applicant). Once the lobola has been paid the relationship becomes a marriage.

The applicant

[9]. The argument by the applicant resolve around the allegation that the purported customary marriage was never registered at the Department of Home Affairs and therefore there was no valid and enforceable customary marriage wherefore the applicant has no obligations whatsoever towards the respondent.

[10]. The applicant admitted that the Isimanje ceremony took place and that his family took the respondent to her parental home to inform the family of the respondent that she is now 'the M[...]'[1] meaning that she has now been given the name of the applicants family.

[11]. The applicant confirmed that he made payment of R 3000 – 00 for lobola[2] but denied that the ceremony of 'Ukuhlambisa' was performed as the ceremony was not completed at the time.

[12]. The applicant testified that if it was that the marriage existed, that the breakdown of the marriage was due to 'some

misunderstanding' and not because the respondent could not have children for the applicant or but due to the respondent misusing the applicant.[3]

[13]. The applicant denied having any knowledge informing his attorney to specifically plead on aspects such as settlement attempts made outside of court.[4]

[14]. The applicant tendered a motor vehicle, other movable assets and to build a home for the respondent.[5]

[15]. The applicant conceded that he would not have a problem if the court a quo would award the respondent a part of the joint estate and that the applicant never indicated that the applicant should not benefit from the divorce.[6]

[16]. The applicant did not question or place the evidence by mr Masongo

[7] in dispute or that it is not permissible in Ndebele culture that the husband should stay with the wife prior to the marriage.[8] the applicant confirmed that a 'girlfriend' is not allowed to take part in customary ceremonies with the family. The applicant did not answer the questions regarding the participation of a girlfriend in mourning and to represent the mother-in-law in certain ceremonies.[9] The applicant did not deny that customary marriage

ceremonies were held [10] or that the expert witness confirmed that the customs to confirm a customary marriage was executed. [11]

THE LAW

[17]. This marriage was concluded on 16th august 1998 which purported marriage was concluded prior to the Recognition of Customary Marriages Act 120 of 1998 (the RCMA) which came into effect on 15th November 2000.

[18]. The Recognition of Customary marriages Act 120 of 1998 (the Recognition Act) was enacted to give effect to Section 28 of the Constitution and to comply with numerous treaties dealing with child law that South Africa is now a party to. South Africa has a dual legal system that sees Africans subject to Customary law which has a different notion of what the family is.

[19]. The following sections of the Recognition Act are applicable -

‘2. Recognition of Customary marriages

- (1) A marriage which is a valid marriage at Customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- (2) A Customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

4. Registration of Customary marriages

.....

- (9) Failure to register a Customary marriage does not affect the validity of that marriage’.

[20]. In *Ngwenyana v Mayelane and Another*’[12] the SCA held as follows -

‘The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislator purposively defers to the living customary marriage. 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’

[21]. In *Wormald v Kambule*,[13] the court indicated that the registration of a Customary marriage is not mentioned as a requirement under section 2 of the Recognition Act and that it could therefore not be regarded as such; the only additional requirement to age and consent was that the 'marriage should have been concluded in accordance with the customs and usages traditionally observed among the indigenous African peoples of South Africa'.

[22]. The historical non-recognition of Customary marriages in South Africa illustrates the injustices women from these marriages suffered.[14] The Recognition Act attempts to ameliorate these injustices. In the past, some husbands did not comply with all the formalities of the Marriage and Matrimonial Property Law Amendment Act when they concluded consecutive Civil marriages without first dissolving the Customary marriages. In this regard the courts have held the Customary marriages to be automatically dissolved.

[23]. In the past the courts regarded marriages that did not comply with the requirements to be voidable in order to ensure at least some protection to the families of the different marriages. In the case of registration, for example, the courts regarded registration as *prima facie* evidence of the existence of a marriage rather than as a requirement for the marriage.[15] The practices are defined with reference to Customary law - similarly defined as in the Recognition Act to refer to living Customary law [16]

- which requires an examination of how a community understands the practice. This incorporation of living Customary law positions the Act as a flexible and adaptive regulation of Customary law rather than a static, codification of Customary law principles.

[24]. For example, in *Mathaba v Minister of Home Affairs*[17] there was a dispute regarding the existence of a Customary marriage on the basis that the handing over of the bride, argued to be an essential of a Customary marriage, had not taken place. The court emphasised the need to understand what the families agreed to as being necessary for a Customary marriage to come into existence rather than an automatic application of a fixed rule.

[25]. Similarly, in *Fanti v Boto*[18] the court noted that the families of the spouses have to agree acceptable arrangements for the payment of lobolo. 83

[26]. Despite the Recognition Act anticipating that individuals would comply with the requirements of their respective communities, a standard set of requirements for marriage has emerged; namely, family participation, the negotiation of lobolo and handing over of the bride. [19] However, it is problematic where judgments are viewed as binding precedent rather than sources of law. It would mean that a court's

finding sets the requirements of a marriage rather than the practices of the community.

[27]. The Act provides that a certificate of registration constitutes *prima facie* proof of the existence of a Customary marriage and of the particulars contained therein, but further that non-registration or failure to have the marriage registered does not affect its validity.

[20] The SCA held in *Tsambo v Sengadi*

[21] that customary law is by its nature constantly evolving and 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.

[28]. The alleged Customary marriage in this case before the court was not registered in terms of the provisions of this Act. It is also clear that the marriage was contracted before 15th November 2000 (16th August 1998) that is, the date of the coming into operation of the Act. When registration takes place, the certificate of registration is regarded as prima facie proof of the existence of the marriage. However, registration is not a prerequisite for the validity of this marriage. Thus the marriage might exist and be valid without registration. The effect of imposing an obligation on the part of the spouses to have their marriage registered and simultaneously providing that failure to register the marriage does not affect its validity has been described as follows-

‘The fact that all Customary marriages, including those in existence when the Act came into operation, must be registered will probably be paper law for a long time to come. Admittedly, the Minister may extend the period within which to register, but registration is mainly not part of the process Registration has by the way, been possible since 1968 but nobody ... availed him or herself of the opportunity. We are not aware of any programme to bring the present necessity for registration to the notice of public’. [22]

[29]. To have the marriage registered may, in certain circumstances, also be very difficult if one of the parties to the marriage is unco-operative and also where the members of the family groups who were involved in the negotiations leading to the marriage do not offer their co-operation. In this case, the registering officer would not be satisfied by information placed before him or her for purposes of effecting registration that a Customary marriage was contracted and is in fact in existence. [23] This is as result of the fact that a Customary marriage need not be registered to be valid and furthermore that contracting a Customary

marriage is a process that may take a number of years commencing with the negotiations proceeding such marriage.

[30]. If the registering officer refuses to register a Customary marriage, the court may be approached by application, and upon investigation, order the registration or cancellation or rectification of any registration of a Customary marriage effected by the registering office.[24] In the determination of the existence or validity of a Customary marriage, the date on which the marriage was contracted is of paramount importance. The date on which the Act came into operation is important in this regard. [25]

[31]. If the marriage is entered into before this date, it has to comply with the requirements laid down by uncodified Customary law.

[32]. It has to be noted that the applicant in this case alleged that she was married by Customary rites to the respondent basing this on the alleged agreement between the families with regard to the amount of lobolo to be furnished and already given for her proposed marriage. The witnesses of the respondent confirmed the completion of the rituals and ceremonies which is part of the wedding culture.

[33]. A Customary marriage is a process and comes into existence when the lobolo agreement is concluded (irrespective of whether it has been fully paid) and the parties commence living together. [26] An agreement to transfer lobolo or part thereof is, in terms of Customary law, an indication that the parties intended to contract a Customary marriage. It is submitted that once this allegation is made by a party in any litigation, it raises a presumption of the existence of a marriage. The presumption becomes almost irrefutable if the parties had already commenced living together as husband and wife after this agreement, which signifies the handing over of the bride to the bridegroom. [27]

[34]. In *Feremba v Matika*

[28] the court held as follows –

‘As correctly pointed out by the trial magistrate, decisions of this court and of the Supreme Court on the issue have shown judicial

activism on the part of the courts in an effort to find a remedy where none exists recognises the Unions as marriages. Neither has statute law made such provision. While the decisions of this and the Supreme Court are clear that some remedy has to be fashioned for the benefit of women in the position of the respondent, the courts have not been unanimous on the basis of such a remedy’.

Marriages in terms of the Recognition of Customary Marriages Act 120 of 1998- Marriages entered into prior to 14th November 2000 and dissolved after 14th November 2000

[35]. The Recognition Act came into operation on 15th November 2000 and is applicable to all Customary marriages which have been concluded according to Customary law concluded before or after 15 th November 2000. The Recognition Act now also prohibits a spouse who is a party to a valid Customary marriage from entering into a Civil marriage in terms of the Marriage Act 25 of 1961.

[37]. Monogamous and Polygamous Customary marriages entered into after November 2000 must comply with the requirements of the Recognition Act.

[29] According to *Matsoaso v Roro*

[30] the Court found that ‘[o]ne of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family namely that of the groom’.

[38]. The SCA went further in *Moropane v Southon*

[31] stating that –

‘Importantly, the two experts agreed that the handing over of the makoti to her in- laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family’.

[39] In *Fanti v Boto*

[32] the court held as follows –

‘All authorities are in agreement that a valid customary marriage only comes about when there has been formally transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family occurs. Her acceptance by the groom's family and her incorporation into his family are ordinarily accompanied by well-known extensive rituals and ceremonies involving both families’.

[40]. In considering lobolo, the courts must promote these values. Disregard of a community's culture, and especially substituting a cultural practice with one from another culture, or abolishing a cultural practice without due regard to its social

context and cultural consequences, may amount to cultural domination which is nothing less than discrimination on cultural grounds. Such disregard may also constitute a violation of the dignity of a cultural community.

[41]. The Customary marriage involves the taking of the girl by the groom's family where she will be asked questions about where she comes from, the process of Isimaje which is the introduction to the groom's ancestors, introducing the girl to the lifestyle of the groom and after the girl has been welcomed there is the slaughtering of an animal whereupon the girl is given the arm and the skin of the slaughtered animals proof that the meat was not bought at the butchery.

[42]. The groom's family would then accompany the girl to her parental home lobola negotiations and / or payment. The gall of the slaughtered animal would be spilled on the elders and meat would be exchanged between the families. This symbolise the commitment to the marriage which is referred to as kist and Isifungu. The custom of Isimanje would be conducted first and then lobola is paid or the other way round. It is not custom for the groom to stay with the girl before

lobola has been paid.

[43]. Ukuhlambisa would follow where gifts are exchanged after the lobola negotiations took place and finished. Where Isimanje has been concluded but Ukuhlambisa not, the couple is considered to have been married. The girl would not be able to represent the family at any ritual or ceremony or any action of the family, if the girl is not married to the groom. The same would be applicable at Ukuzila – the mourning of the dead. Where lobola has not been paid as yet, it cannot be argued that the girl is not the wife of the groom. Exchanging of gifts would include blankets which confirm the joining of the two families. The marriage is then concluded and confirmed – Ukuhlambisa Isigom and once lobola has been paid the marriage is confirmed (the Isinaje promise).

[44]. The integration of the bride usually coincides with a social gathering such as a celebration. The husband, his wife and both families get together to celebrate the unity between the two Parties. The celebration is also usually a community event, where neighbours join in the festivities. Lots of photograph are taken and a feast is enjoyed.

[45]. When it comes to the Ndebele custom (and others customs) , our Courts have specifically recognised certain rituals which are conducted over several days that constitutes a valid customary marriage.

[45.1.]. The bride to be will be introduced to the husband's ancestors at their family home.

[45.2.]. A meeting will be held where the bride will be instructed and advise her on how to act as a wife in their specific family. (This is called Kuyayeyezelwa).

[45.3.]. A secret ceremony will follow where only the bride and people of the family who have already been to similar ceremony are present. A goat is then slaughtered to celebrate the union (This is called Umyanya Wamaskokana).

[45.4.]. The bride is then returned to her family where a big celebration takes place. During this celebration another beast is slaughtered, and the meat is divided between the families according to tradition.

CONCLUSION

[46]. From the evidence by the witnesses of the respondent it is clear that the ceremonies of the Ndebele tradition for a customary marriage including the lobola have been concluded.

[47] From the evidence presented to the court a quo and the conclusion reached by the court a quo in its judgment that there was proof of the existence of a Customary marriage between the applicant and the respondent is not to be faulted.

[49]. A court of appeal will only intervene where there is a serious misdirection or inappropriate interpretation and application of the law.

[48]. It is the courts view that the court a quo did not misdirect itself in the judgment including the summary of the evidence and the conclusions reached therein to have granted the relief sought by the respondent as the plaintiff in the divorce action.

ORDER

[49]. The appeal is dismissed.

[50]. The applicant is ordered to pay the cost of the respondent on a party-and-party scale.

H.C. JANSEN VAN RENSBURG

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MBOMBELA DIVISION [MIDDELBURG LOCAL SEAT]

I agree

H. BARNARDT

MBOMBELA DIVISION

[MIDDELBURG]

DATE : 21ST OCTOBER 2020

[The parties agreed that the appeal is dealt with on the papers]

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[1] Page 242-243 of the record.

[2] Page 248 of the record.

[3] Page 273 of the record.

[4] Page 277 of the record.

[5] Page 276-279 of the record.

[6] Page 75 of the record.

[7] Page 284 of the record.

[8] Page 288 of the record.

[9] Page 311 – 312 of the record.

[10] Page 330 of the record.

[11] Page 332 of the record.

[12] 2012 ZASCA 94; 2012 (4) SA 527 (SCA); Tsambo v Sengadi (2020) ZASCA 46- ‘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’

[12] 2012 ZASCA 94; 2012 (4) SA 527 (SCA); Tsambo v Sengadi (2020) ZASCA 46-

‘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’

[13]

(2005) 3 SALJ 562; [2005] 4 All SA 629.

[14] Felicity Kaganas & Christina Murray Law Women and the Family: The Question of Polygons in a new South Africa in Erasmus et al at 116.

[15] Wormald v Kambule [2008] 3 SALR 562 (SCA); [2005] 4 All SA 629.

[16] The Reform Act adopted the definition used in the Recognition Act ; Portfolio Committee on Justice and Correctional Services 2008 <http://pmg.org.za/committeemeeting/940>.

[17] 2013 JOL 30820 (GNP) at para 17.

[18] 2008 5 SA 405 (C) at para 23.

[19] Bakker 2018 PELJ 2.

[20] Section 4(8) and (9) of the Act.

[21]

(2020) ZASCA 46.

[22] Maithufi and Bekker The Recognition of Customary Marriages Act of 1998 and its impact on Family Law in South Act 2002 CILSA 182, 196-197

[23] Section 4(4)(a) of the Act; Mbatha The Recognition of Customary Marriages Act : Monitoring Implementation 2002 Gender Research Project Bulletin CALS 3.

[24] Section 4(7) of the Act.

[25] Proclamation R 66 of 2000 Regulation Gazette 6909 dated 1 November 2001.

[26] Khumalo v Khumalo 1942 NAC (N&T) 31.

[27] Olivier et al 22.

[28] HH 33/07.

[29] Section 3 and 7(6) of the Act.

[30] At para [18]; Mabuza v Mbatha 2003 (4) SA 218 (C).; Mbungela and Another v Mkabi and others 2019 ZASCA 134: 2020 (1) SA 41 (SCA).

[31] At para [40].

[32] 2008 (5) SA 405 (C) at para (22).

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