

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **12/23280**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE

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DATE

In the matter between:

MS. MBATA SIBONGILE

Plaintiff

And

CAPE GATE PROVIDENT FUND

First Defendant

BILLY NTAOPANE

Second Defendant

DEPARTMENT OF HOME AFFAIRS

Third Defendant

MASTER OF THE HIGH COURT

Fourth Defendant

JUDGMENT

MATOJANE J

- [1] This is an application for absolution from the instance by the defendant at the end of the plaintiff's case.
- [2] The plaintiff is a female teacher by profession. The first defendant is a Provident Fund established in terms of the Pension Fund Act 24 of 1956. The second defendant is the brother of the deceased and a duly appointed representative of the deceased estate. The fourth respondent is the the Master of the High Court responsible amongst other, the administration of deceased estates.
- [3] The plaintiff instituted an action seeking *inter alia*, an order declaring the customary marriage she purportedly entered into with the late Zacharia Kabelo Ntaopane to be a valid customary marriage. The second defendant denies that the deceased was married to the applicant.
- [4] The following facts have been admitted by the parties in writing and are accordingly common cause.
 - 4.1 The correctness of the expert report compiled by Mr. Cecil Greenfield, a forensic examiner of questioned documents dated 15 June 2015.
 - 4.2 that second defendant was not present at a meeting allegedly held on the 14th December 2008 when lobola was allegedly paid and he denies that such meeting took place.
 - 4.3 The family of the deceased, in particular second defendant were not aware of the meeting purportedly held on 14 December 2008 when lobola was allegedly paid.

4.4 That second defendant was appointed a representative of the estate of the deceased.

4.5 The deceased, Zacharia Kabelo Ntaopane died on the 7 April 2012.

[5] Before setting out the facts it is pertinent to set out the correct approach to an absolution application. Harms JA in **Gordon Lloyd Page & Associates v Rivera and Another**¹ set the test as follows:

‘[2] The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

“...(W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).)”

This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” (*Gascoyne* (loc cit)) – a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury (*Ruto Flour Mills*).

¹ 2001 (1) SA 88 (SCA) at 92E-93A:

Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.’

[6] The defendant in its argument in support of the application for absolution and in its opposing affidavit essentially relies on three grounds based in turn on three propositions. These are the following:

- 6.1 Firstly it is contended that a fraud has been committed
- 6.2 Secondly, it is contended by second defendant that close family members of the deceased, in particular, Joseph Ntaopane, the only surviving brother of the deceased’s mother would have known of the alleged customary marriage and would have taken part in lobola negotiations if ever there were such negotiations.
- 6.3 It is contended that the deceased had a long term relationship with Elizabeth Nkopane from January 2006 until his death and never cohabitated with the plaintiff who was his mere girlfriend. (Elizabeth Nkopane has deposed to a confirmatory affidavit.)

[7] The second defendant accordingly submits that the evidence adduced during the course of the plaintiff’s case both in chief and in cross-examination should lead me to conclude that the plaintiff has failed to make out a *prima facie* case in that she has not crossed what is referred to as the low threshold of proof that the law sets

when a plaintiff's case is closed but the defendant's is not. See **De Klerk v Absa bank limited and others**²

Falsity

- [7] Mr Greenfield is a forensic examiner of questioned documents, he was asked to examine the signature purportedly belonging to the deceased on a handwritten note allegedly recording the lobola agreement and to express his opinion on its authenticity. He concluded that the signature on the note was not consistent with those of the acknowledged signatures of the deceased. The applicant accepts the correctness of this report. In my view, it is reasonable to find that the note which purportedly is an acknowledgment of receipt of the sum of R6 000.00 being part payment of the agreed lobolo of R10 000.00 was obtained by deliberate deceit and was false in the respect complained off. The falsity must taint its entire subsequent existence as the law cannot permit propagation of the fruits of dishonesty. See **Murabi v Murabi** and others³.

Conclusion of a customary union

- [8] Applicant testified that during October 2008 the deceased informed her father in writing that he wanted to pay lobola for her on the 14th December 2008. The deceased gave the letter to her sister to deliver to her father. This is contradicted by her evidence in the founding affidavit where she stated that deceased went to make an appointment with her father and informed him that he wanted to pay lobola on the 14th December 2008.

² 2003(4)SA 315 SCA at para1

³ (893/12)[2014] ZASCA 49 (1 April 2014) at para 14

- [9] She testified that she did not know the deceased's parents. The deceased informed her that his mother died when he was 16 years old. She was not certain of the address of the deceased parental home which is a walking distance from her home. She testified that deceased was not on good terms with his relatives in particular the second defendant and that is the reason why the deceased never informed him of the meeting of the 14 December 2008 where lobola was negotiated and paid.
- [10] She testified further that the deceased asked his friend, one Ananias Kharoli, who was his colleague at work to accompany him to pay lobola. Her father and her sister represented her at the lobola negotiations. It was agreed that lobola will be ten cows and one cow would be equivalent to one thousand rands. Deceased paid R6000.00 and the balance was to be paid in due course. The agreement was reduced to writing and signed by all present. This is the note in which the deceased signature was found to be forged.
- [11] On the same day her father sent her cousin to buy a sheep that was slaughtered and neighbors came to feast on the sheep, thereafter her sister "delivered" her to her house she shared with the deceased. She contradicts her evidence in her founding affidavit where she stated that her sister "delivered" her to her house the following day. It must be inferred from her alleged "delivery" that plaintiff seems to be aware that at customary law a handing over of the bride to her in-laws is an ingredient of a valid customary marriage⁴. She clearly wants to create an impression that a marriage requirement that she be handed over to her in-laws was complied with when her sister walked her to her house. The fact of the matter is that she was never handed over to her in-laws as on

⁴ (see TW Bennet **Customary law in South Africa** (Cape Town: Juta 2004) at 214-216

her evidence her in-laws were not party to whatever was allegedly agreed upon on the 14 December 2008.

[12] Plaintiff stated under cross-examination that she could not comment on the disputed signature of the deceased on the note as she was not present when it was written. When asked by the court why a sheep was only bought and slaughtered after part of lobola was paid for the neighbors to feast on, plaintiff mentioned for the first time that food was prepared for the guests before the sheep was bought. Her evidence segued from the sheep being eaten by neighbors to the sheep being cut into half and she been given half to take home and the other half eaten by neighbors who came to celebrate. When pressed to explain whether neighbors get invited to lobola negotiations she tried to explain it away by saying that she does not know what happened to the other half of the sheep as she had to leave.

[13] In answer to a question from the court, plaintiff explained that a ritual involving a slaughter of a sheep had to be performed for her because as a "prophet" she could not stay with the deceased who had not been introduced. She explained that the slaughter of a sheep was a ritual for "prophets" and "healers" like her. She further testified that it was important to combine the blood of the two family groups by sharing the sheep but conceded under cross-examination that she and her father shared the sheep amongst themselves. She could not explain how the blood of the two family groups could be combined if the family of the deceased was excluded.

[14] Plaintiff called her father Mr. Zalempi July Mbatha as her witness. Mr. Mbatha was sitting in court listening to her evidence as she testified. His evidence was a repetition her evidence. Like the

plaintiff, he testified that deceased sent him a letter informing him that he was coming to pay lobola for the plaintiff, as already indicated, this is a repetition of the evidence plaintiff gave which is contrary to what she said in her founding affidavit. He testified that according to his custom if more than half of the requested lobola is paid a sheep is slaughtered.

[15] Mr. Mbatha explained that it is only when the balance of lobola is paid in full that a cow is slaughtered and friends and family are invited to the celebration of the marriage and gifts are exchanged. This was not done in the present case. It must follow, in my view, that a customary marriage between the plaintiff and the deceased cannot be presumed to have taken place under the circumstances.

[16] To prove her cohabitation with the deceased plaintiff testified that she had deceased registered in her medical aid. It is significant that while her other beneficiaries on her medical aid were registered on the 1 November 2007 the deceased was registered on the 1 March 2012 and he died on the 7 April 2012 a month thereafter. This in my view, cannot be used as proof that plaintiff cohabitated with the deceased.

[17] Plaintiff also referred to a computer print out of the deceased's metropolitan life policy in which she and her children by another man are beneficiaries. There is no indication in the print-out of the date on which the policy taken. This again cannot constitute proof that plaintiff and the deceased cohabitated.

[18] In my view, if indeed Mr. Ananias Kharoli and the plaintiff's sister were present at the meeting of the 14 December 2008 when lobola was negotiated and paid for, plaintiff would have called them as witnesses to corroborate her evidence, in particular, the disputed

signature on the note allegedly confirming receipt of part payment of lobola. This she has failed to do. Plaintiff also sought to suggest that the deceased's sister was aware of the customary marriage but again failed to lead her evidence. In the absence of an explanation for their unavailability, her failure to lead their evidence gives rise to a natural inference that their evidence would be detrimental to her case and an adverse inference is justified under the circumstances. See **LAWSA** Volume 9 page 343 and the cases cited there.

[19] In my view, plaintiff is a very unsatisfactory witness and her evidence and that of her father was simply not credible enough to discharge any onus of proof.

[20] To return to the test for absolution from the instance at this stage of the case. The enquiry is whether there is evidence upon which I could or might (not should, nor ought to) find for the plaintiff. To the extent that an inference is relied upon it must be a reasonable one. Having considered the evidence before me and the submissions made I am of the view that plaintiff has failed to meet the threshold required in order to avoid absolution from the instance.

Order

[21] Absolution from the instance at the close of the plaintiff's case is therefore granted with costs.

KE MATOJANE

Hearing Date: 2 March 2016

Judgment Date: 7 March 2016

Applicant: Adv MD Hlatshwayo

Defendant: Adv MA Mavodze