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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG NORTH DIVISION, PRETORIA**

Case Number: 29241/09

DATE: 24/03/2010

In the matter between:

M M

And

M N

1st Respondent

MINISTER OF HOWIE AFFAIRS

2nd Respondent

JUDGMENT

INTRODUCTION

1. On the 8th February 2010 the court granted an order declaring a purported customary marriage entered into between the late H D M and the first respondent as null and void *ab initio*.
2. The second respondent was also ordered to register the applicant's marriage to the deceased.
3. The court indicated then that the reasons for judgment would be given later.
4. These reasons are set out below.

THE PARTIES

5. The applicant is M M, an adult widow residing at Malamulele, Limpopo.

6. The first respondent is M N, an adult woman residing at Malamulele, Limpopo.
7. The second respondent is the Minister of Home Affairs, cited herein in her capacity as the political head of the Department of Home Affairs, which Department is responsible for the registration of all marriages, c/o the State Attorney, 8th Floor, Bothongo Heights, 167 Andries Street, Pretoria.
8. The applicant married the late H D M in accordance with customary law and tradition at Nkovani Village on the 1st January 1984. Her husband passed away on the 28th February 2009. The marriage was not registered.

THE ISSUE

9. The deceased is alleged to have married the first respondent according to customary law on the 6th January 2008.
10. This marriage was confirmed by the headman of first respondent's village.
11. The applicant was unaware of the fact that her husband had entered into another marriage according to customary law until after his passing.
12. It is common cause that the second marriage was not preceded by an application to a court of appropriate jurisdiction for an order approving a contract to regulate the future matrimonial property system of the two marriages, as provided for in section 7 of the Recognition of Customary Marriages Act 120 of 1998.
13. The applicant contended that the second marriage was null and void because of the failure to obtain such an order.
14. The first respondent advanced the argument that the fact that her marriage to the deceased was properly and publicly performed in accordance with customary law was sufficient to establish an unassailable second marriage entered into by the deceased.
15. In the light of the competing claims by the applicant and the first respondent, the second respondent's offices refused to register the applicant's marriage to the deceased.

THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998

16. The Recognition of Customary Marriages Act ("the Act") was introduced to place customary marriages on an equal footing with civil marriages. The preamble reads, *inter alia*, as follows:

"To make provision for the recognition of customary marriages; to specify the requirements

for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations..."

17. Sections 2 (recognition of customary marriages as valid marriages) and 3 (recording the requirements for a valid customary marriages) of the Act underline the intention of the Legislature to place the customary marriage on an equal footing with other marriages. Section 6 establishes and enshrines the equal status of spouses in the marriage while the proprietary consequences of a marriage are set out in section 7. The Act also provides for the registration of customary marriages entered into prior to the promulgation of the Act.

18. The intention to place both marital systems on an equal footing by the promulgation of the Act was recognized in *Thembisiie v Thembisile* 2002 (2) SA 209 (T); (for comment on the judgment see *Maithufi* in 2003 *De Jure* 195 et seq.; and for a critical assessment of the judgment and the effect of the Act and the potential shortcomings of both see *Bonthuys and Sibanda 'Til death do us part'* in 2004 *South African Law Journal* 784 et seq.). "*With the commencement of the Recognition of Customary Marriages Act*

...full legal recognition is now given to monogamous and polygynous customary marriages entered into before and after the commencement of the Act." - S Human 'Customary marriages' in M Carnelly and A Skelton (eds) *Family Law in South Africa*, Oxford University Press, Cape Town (forthcoming 2010).

19. Should a husband in a customary marriage wish to enter into a further customary marriage with another woman during the subsistence of the first such marriage, section 7 provides that the second marriage must be preceded by an application to court (defined as a High Court, a family court established under any law and a Divorce Court established under the Administration Amendment Act 9 of 1929) to approve a written contract which will regulate the future matrimonial system of the marriages.

20. Section 7 of the Act reads as follows:

"7 Proprietary consequences of customary marriages and contractual capacity of spouses

(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).

(4)(a) Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that-

(i) there are sound reasons for the proposed change;

☐ *ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and*

no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons

having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

(5) Section 21 of the Matrimonial Property Act, 1984 (Act ' 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.

(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection 6-

(a) the court must-

(i) in the case of a marriage which is in community of property or which is subject to the accrual system-

(aa) terminate the matrimonial property system

which is applicable to the marriage; and (bb) effect a division of the matrimonial property;

(ii) ensure an equitable distribution of the property;

and

(iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

(b) the court may-

(i) allow further amendments to the terms of the contract;

(ii) grant the order subject to any condition it may deem just; or

(iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

- 8) *All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6). (9) If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated."*

The validity of a subsequent marriage entered into in conflict with section 7 (6)

21. Section 7 emphasises the fact that spouses in a customary marriage have equal status and capacity.

22. It is clear that this section is aimed at protecting both the existing spouse or spouses and the new intended spouse by ensuring that the husband must obtain the court's consent to a further customary marriage, albeit that such consent is expressed in proprietary terms.

23. Both the existing spouse and the intending further spouse have a vital interest in having their relative proprietary positions safeguarded by the procedure that is laid down in sub-section (6). Most customary marriages are concluded by persons whose access to worldly goods is limited and whose financial security may be severely prejudiced by an earlier or the conclusion of another marriage if such fact is not disclosed to the spouses and dealt with by the contract and the court's approval.

24. The failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect. *Cronje and Heaton* argue in *South African Family Law*, 2nd ed., p.204 that the court's intervention would be rendered superfluous - which the Legislature could not have intended - if invalidity did not result from a failure to observe subsection (6). See further *S Human*, op.cit., who endorses this view.

25. A further argument that a failure to comply with the subsection leads to invalidity of the subsequent further customary marriage arises from the peremptory language of the provision: The word "must", read with the provisions of subsection (7)(b)(iii), empowering the court to refuse to register a proposed contract, indicates that the Legislature intended non-compliance with the statute to lead to voidness of a marriage in conflict with the provision.

26. In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA), Brand JA said the following on 321 at par [32]:

"The general principle is, of course, that language of a predominantly imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see eg Sutter v Scheepers 1932 AD 165 at 173 - 4). Even though the provisions under consideration are drafted in narrative form, common sense dictates that this principle be afforded some weight. An even more significant indication that timeous payment of the application fee is peremptory is that the invitation contains an explicit sanction for non-compliance with the provision - an application submitted without proof of proper and timeous payment will not be considered (cf Sutter v Scheepers (supra at 174)). There is also the more general consideration that where, as in the present case, a statute provides for the acquisition of a right or privilege - as opposed to the infringement of an existing right or privilege - compliance with formalities that are prescribed for such acquisition, should be regarded as imperative. (See eg R v Noorbhai 1945 AD 58 at 64; South African Citrus Exchange Ltd v Director-General: Trade and Industry and Another (supra at 241E - I).) In the end, these considerations leave no room for any construction of the specific provisions that Pepper Bay had failed to comply with, which allows for a discretion on the part of the Chief Director to condone such non-compliance."

27. The most persuasive consideration must however be the gross infringement of the first or earlier spouses' fundamental rights: To respect of their dignity, physical and emotional integrity, their right to protection from abuse - in this instance both emotional and economic or material - ; their right to be treated on an equal footing with their husband as decreed by the Act; their right to equal status as marriage partners arising from the Act; their right to marital support from their husband; their right to marital intimacy and trust, which rights flow naturally from those guaranteed by the Act and the Constitution. A gross infringement of these rights would be committed if the husband were to be allowed to enter into a further marriage without their knowledge and acquiescence.

28. On the other hand, the intending spouse in a further marriage is, by the same token, entitled to be fully informed prior to the conclusion of such marriage of her future husband's existing marriages and the full financial and emotional consequences thereof.

29. The Act is silent on the question whether the consent of the first or earlier spouses to the proposed further marriage is required or whether their views on the proprietary and economical considerations only need to be considered by the court. The absence of a specific reference to the consent of an earlier spouse would, at first blush, suggest that the Legislature intended to leave this question for the determination by the provisions of the relevant customary legal system in this respect. If so, the compatibility with the Bill of Rights enshrined in the Constitution of such an approach may in future have to be considered - it clearly does not arise in this case. *A fortiori*, however must the absence of a specific requirement to obtain an earlier spouse's consent to the proposed further marriage lead to the firm conclusion that, at the very-least, the consideration of the views and needs of the earlier spouse(s) by the court seized with the formulation of the contract upon the approval of which the further marriage rests, is obligatory and that no further marriage may be concluded without a contract having been entered into and approved by the Court.

30. In addition, the rights of any children born from the earlier marriage and still dependent upon their parents may obviously be vitally affected. The court faced with the question whether a further marriage should be approved must take their interests into account as a constitutional obligation arising from section 28(2) of the Constitution. Their mothers would usually be in the best position to assess their needs and to enlighten the court in that regard, but children of sufficient maturity will also fall into the class of "having a sufficient interest" intended by subsection (8) of the Act.

31. Seen in this light, it is clear that the conclusion that a further marriage concluded without observing the dictates of the Act is void rather than voidable, is to be preferred to the argument raised by Bennett, *Customary Law in South Africa*, 2004, p 247 and 248. He states, after (correctly) concluding that a further marriage in conflict with a court's order refusing to register a proposed contract would amount to contempt of court, that: *"The procedure was imposed to protect wives; if they do not protest, then their long-term interests may be better served by treating the relationship with the husband as a valid marriage."* In note 39 the learned author adds: *This argument will also accommodate the strong probability that few husbands will comply with the Act. To deem all ensuing unions void will work hardship on the wives and children when the husbands die or institute divorce proceedings."*

32. With respect to the learned author this argument cannot be upheld in the light of the Legislature's clear intention to accord existing wives the full protection of the Bill of Rights in the context of customary marriages. An existing wife may very often be entirely dependent upon her husband together with her children, may be unaware of her rights, may be illiterate or too timid or impecunious to seek legal advice and may suffer the economic and emotional deprivation brought about by a subsequent marriage long before a separation as a result of death or divorce. To rely on an absence of protest by a wife who may live in fear of rejection - not to mention the children born of an earlier union - would be to consign the issue of voidability to a most uncertain and indeed arbitrary test. The Legislature certainly did not intend to create a morass of uncertainty.

33. If a further marriage was to be recognized in spite of a failure to comply with the Act, the additional wife might, as a result of a favourable marriage contract with the husband, receive considerable financial and other benefits to the detriment, possibly even to the total impoverishment, of the first spouse and her children. This would surely fly in the face of the Legislature's intention.

34. The answer to the risk that husbands may not be willing to enter into the required contract before entering a further marriage lies in the empowerment of women in the communities in which customary marriages are prevalent. Such empowerment must be brought about by informing them of their rights and the manner and fashion in which they may protect and enforce these rights; and familiarizing them with the provisions of the Act.

35. The intending spouse of a further marriage is obviously also at risk if her marriage is not sanctioned by entering into the required contract, as she will find herself not to have been married at all if the husband passes away or becomes embroiled in a divorce. Apart from the need to inform all women of their rights, a woman who is duped into believing that her husband is free to marry and not involved in an earlier marriage may have claims sounding in delict against him or his estate, while her children would have been born in a putative marriage, which fact would protect their status.

36. The first respondent remained childless in this instance and any potential claims against the late husband's estate have not been raised in these proceedings.

The facts

37. It has been recorded in the Introduction that the applicant was married in a customary marriage

that was not registered as provided for in the Act.

38. This marriage was concluded before the Act commenced.

39. When the applicant attempted to have the marriage registered after the deceased's death she was informed that the first respondent also claimed to have been married to the deceased.

40. The offices of the second respondent, who has abided the Court's decision, refused to register the applicant's marriage because of the first respondent's claim, not because a late registration of her marriage is impossible.

Conclusion

41. In the light of the common cause fact that the first respondent's purported marriage to the deceased, entered into after the Act was promulgated, was not preceded by the conclusion of a contract as envisaged in section 7 (6) of the Act, the purported marriage of the first respondent to the deceased is void. The applicant is therefore entitled to a declaratory order to that effect. She is also entitled to have her marriage to the deceased registered.

The orders referred to above were therefore made.

Signed at Pretoria on this 24th day of March 2009.

E BERTELSMANN

Judge of the High Court

For Applicant Adv T masevhe Instructed

by Rammuha- at Law Inc

For Resp: Adv E Niewoudt Instructed

by Pretoria Justice Centre