

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Appeal Case No. CA 81/2022

Case No. 2669/2021

Heard on: 16 October 2023

Date delivered on: 30 January 2024

In the matter between:

N[...] P[...] B[...]

Applicant/Appellant

And

T[...] I[...] B[...]

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

FULL COURT JUDGMENT

MAJIKI J:

INTRODUCTION

[1] Dunywa AJ dismissed the appellant's application seeking an order that her civil marriage with the first respondent (T[...]) be declared invalid or, alternatively, if it is valid, that it be declared to have consequences of a marriage out of community of property and profit and loss. In the appeal, the appellant also seeks leave to lead further evidence that T[...] had paid *lobola* for one M[...] A[...] (A[...]) to establish a customary marriage with her in 1987. Both

the appeal and the application to lead further evidence are opposed. T[...] filed an answering affidavit in the application, which was not followed by a replying affidavit. The appeal to this Court is with the leave of the court *a quo*.

[2] The grounds of appeal are that the court *a quo* erred in finding that:

(i) T[...] and A[...] were never involved in a customary marriage at the time when T[...] and the appellant entered into a civil marriage on 1 October 1997.

(ii) the appellant's claim that T[...] had paid lobola for his marriage with A[...] was inadmissible hearsay evidence.

BACKGROUND FACTS

[3] On 1 October 1997 the appellant and T[...] married civilly, in community of property and profit and loss. On 15 February 2019 T[...] instituted divorce proceedings in the Regional Division of the Magistrates' Court, Mthatha. The said action was defended by the appellant. One of the issues for determination in the divorce proceedings was, *inter alia*, whether T[...] was entitled to an order of forfeiture of the marital benefits arising from the consequences of his marriage in community of property. On 18 June 2021, whilst the divorce action was pending finalisation, the appellant brought the application proceedings to the high court based on urgency. Those proceedings are the subject of this appeal.

[4] On 5 August 2022 the magistrate granted a decree of divorce, and ordered a division of the joint estate. The appellant did not appeal that divorce order. In the light of that order, the attitude adopted by T[...] is that the judgment by the

magistrate rendered the relief sought by the appellant in this Court moot. I will revert to the issue of mootness later on in this judgment.

[5] To appreciate the merits of this appeal, the examination of the evidence that was considered by the *court a quo* is necessary. The appellant stated on affidavit that she had recently learnt that T[...] married her whilst he was a party to a customary marriage with A[...]. She did not disclose the source of that information, averring merely that she entertained fear of intimidation. She also alleged that certain family members had difficulties deposing to affidavits as that would have the potential of causing disharmony in the family. She described T[...] as someone who was always away from their marital home, and spent most of his time in Cape Town. He usually returned home once a year for less than a week at each instance. She thought that T[...] was cohabiting with another woman in Cape Town. She contended, based on undisclosed sources, that since T[...] was involved in a customary marriage with A[...], he was not entitled to benefit from the fruits of her hard work, the fifty percent (50%) of her pension interest, including the division of the joint estate that he claimed in the divorce papers.

[6] T[...] raised a point *in limine* contending that the appellant's claim that he was involved in a customary marriage was inadmissible hearsay evidence. He denied the existence of that marriage. He alleged that A[...] is merely the mother of his two children, a fact that was known to the appellant even before they entered into the marriage in 1997. He contended that he was entitled to an equitable division of the joint estate as a consequence of his marriage, and that the claim made by the appellant that she was entitled to the exclusive retention of the matrimonial property at No. [...] S[...], Southridge Park, Mthatha demonstrated lack of appreciation of the consequences of a marriage in community of property.

[7] In the replying affidavit, the appellant attached an affidavit purportedly deposed to by A[...] before the official of South African Police Services in Khayelitsha, Cape Town (the first affidavit). It appears in that affidavit that A[...] confirmed the existence of her customary marriage with T[...] and that a sum of Three Thousand Rand (R3 000.00) was paid as her *lobola* around March or April 1987. The ritual of *Tsiki*¹ was performed for her the following year.

[8] It is not in dispute that T[...] subsequently launched an application in Cape Town to declare the alleged customary marriage invalid. In the court *a quo* the urgent application was set down for hearing on 11 November 2021. On 5 November 2021 T[...] filed a supplementary affidavit to his answering affidavit stating that A[...] advised him that she denied the correctness of the facts set out in her affidavit, alleging that she had been misled by the appellant's legal representative to believe that deposing to those facts would entitle her to immediate payment from a certain fund that had been created by T[...] for the benefit of her children. A[...] deposed to another affidavit (the second affidavit) confirming all the facts concerning her as stated by T[...] in his supplementary affidavit. In doing so, she went so far as to retract the facts stated in her first affidavit. Significantly, A[...] denied that she and T[...] had entered into a customary marriage. Thereafter, on the date of the hearing, the appellant's legal representative filed an explanatory affidavit denying that she had promised A[...] a payment for her children, and challenging the veracity of A[...]’s signature that appeared on the second affidavit. The appellant simultaneously filed a report by a handwriting expert which certified that the signatures in the first and second affidavits purportedly appended by A[...] were not written or created by the same author.

¹*Tsiki* can be described as a customary ceremony or ritual signifying transfer or welcoming of a bride to the husband's home through the slaughtering of a sheep. The bride eats a piece of roasted meat called *isiphika* from the sheep.

[9] The issue concerning the disputed signatures was referred by Dunywa AJ to hearing of oral evidence for determination of whether they belonged to A[...] or another person. A[...] testified in the witness box that she appended her signature on both affidavits. The examination of the court *a quo*'s finding indicates that it accepted evidence that is consistent with the second affidavit. In my view, on the analysis of the evidence as a whole, the court *a quo* was correct in doing so because the allegations in the first affidavit are not probable. Consequently, the *court a quo* rejected the evidence of the appellant that T[...] had surreptitiously entered into a civil marriage during the subsistence of a customary marriage with A[...]. Most importantly, the assertion made by the appellant in all the affidavits that T[...] had paid *lobola* for A[...] was rejected, but on the reason that such was inadmissible evidence.

ON APPEAL

[10] In this matter, three issues fall to be decided. The first is whether the payment of lobola is new evidence worthy of being received in this appeal. The second is whether the relief sought by the appellant is moot. The third is whether the *court a quo* erred in holding that the evidence that T[...] paid *lobola* for A[...] is inadmissible hearsay evidence.

[11] In terms of the provisions of s 19 (b) of the Superior Courts Act² this Court is seized with jurisdiction to adjudicate the appellant's application to introduce further evidence. In deciding whether to allow further evidence on appeal, the Court will be guided by the principles that have evolved in decided

² The Superior Courts Act 10 of 2013.

cases over many years, and which are summarised in Herbstein and Van Winsen as follows³:

‘(a) it is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not (later) be allowed to adduce further evidence, unless the circumstances are exceptional.

(b) The party who makes the application must show that the fact that he has not brought further evidence forward was not attributable to any remissness on his part. He must satisfy the court that he could not have procured the evidence in question by the exercise of reasonable diligence.

(c) The evidence tendered must be weighty material, and presumably worthy of belief, and must be such that, if adduced, it will be practically conclusive.

(d) If conditions have so changed that the fresh evidence would prejudice the opposite party, the court will not grant the application, for example if the witnesses for the opposite party have been scattered and cannot be brought back to refute the fresh evidence.’

[12] The further evidence that the appellant now seeks to be received in this appeal are the confirming statements allegedly made by her in-laws residing in Ngcobo, Cala, Mdantsane and Cape Town that they obtained indirect knowledge at some stages between 2012 and 2013 that *lobola* was paid for A[...]. The source of that knowledge is said to be derived from family gatherings and oral accounts of certain negotiators who have since died. The appellant's application was opposed on the basis that information, as alleged, cannot be reliable as it was gathered from distant family members, other than the negotiators themselves, and based on events that allegedly took place in 1987 in their absence. Further, it was opposed on the basis that it was

³ See : Herbstein & Van Winsen: The Civil Practice Of The Supreme Court Of South Africa, 4th Ed at 909; *Colman v Dunbar* 1933 AD 161 (A); and *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (4) SA 359 at para 41.

opportunistic of the appellant not to place full evidence before Dunywa AJ but to embark on the search for evidence after the divorce and application proceedings had long been finalised.

[13] It was submitted on behalf of the appellant that the disputed issue concerning the validity of the customary marriage would be ventilated exhaustively if the appellant was allowed to adduce further evidence that *lobola* was paid for A[...]. It was submitted further that the success of the appellant in this appeal will provide her with a shield which is necessary for her to prevent sharing her pensions with T[...]. On the contrary, counsel for T[...] submitted that the appellant was remiss in failing to place new evidence before the court timeously. Further, the delay in doing so would be prejudicial to T[...] as he has already been successful in both securing a decree of divorce as well as in warding off the declarator which, if it was not dismissed, would deprive him of the proprietary benefits arising from his marriage with the appellant. In the main, the submission advanced on behalf of T[...] is that the appeal has been overtaken by events with the result that there is no live dispute or controversy that is capable of producing any practical result.

[14] The appellant's application to introduce further evidence does not meet any of the principles that are enumerated in paragraph 11 above. The allegation that T[...] had established a customary marriage with A[...] on proof that he paid *lobola* for her is not new evidence. It was badly raised by the appellant on affidavits, and it was rejected by the court a quo on the basis that it was inadmissible hearsay evidence⁴. There is no fault in the finding that the appellant's evidence in this regard constituted inadmissible hearsay evidence.

⁴ The provisions of Section 3 (1) of the Law Of Evidence Amendment Act 45 of 1988 provides that hearsay evidence shall not be admitted as evidence at civil proceedings unless certain preconditions as stated in section 3 (1) (a) to (c) have been satisfied.

It appears in the founding affidavit of the appellant filed towards the main application that the witnesses who informed her that *lobola* was paid were present when the application was brought, but they had to be withheld to preserve harmony amongst family members. Despite that allegation, the appellant failed to apply for the exception to the hearsay evidence rule to be applied to what was inadmissible evidence. Instead, the appellant manufactured an unconventional method of curing the inadmissibility of evidence by obtaining further facts and had them deposed under oath, under suspicious circumstances. When that route failed, and the judgment unfavourable to her was delivered, she suddenly, and inexplicably, unearthed some witnesses from eNgcobo, Cala, Mdantsane and Cape Town, who are available, to bolster her case that T[...] did pay *lobola* for A[...]. She did not even explain the sudden emergence of such witnesses. However, a closer examination of the claim that there is in existence new evidence that could assist the appeal court to make a just decision shows that the witnesses under question are distant family members who were not even present at the time that *lobola* was allegedly paid. Such witnesses are not likely to give reliable evidence because the probative value of their evidence lies in other persons that apparently informed them that *lobola* was paid. There was only one person who claimed that she and T[...] belonged to the same clan; she grew up with him; she witnessed preparations for the payment of *lobola*; and she was present when A[...] was dressed up as *umakoti*. However, she had missed the preceding ceremony of *ukutyiswa uTsiki* of A[...]. No explanation has been proffered for the failure to have that evidence given at the time the proceedings were launched.

[15] Further, the appellant has not advanced exceptional circumstances that could change the ruling that the evidence that *lobola* was paid is inadmissible. The unassailable facts set out by T[...] in his answering affidavit to the main application that the appellant's claim, that he paid *lobola*, is untrue also put

paid to the application for the introduction of new facts. As I see it, the approach adopted by the appellant was simply that the acceptance of the new evidence might open the door for her to engage in a re-hearing of the main application. That was not to be. The application must therefore fail.

[16] The submission advanced on behalf of T[...] that the decision of the appeal proceedings is moot trenches on the provisions of s 16 (2) (a) (1) of the Superior Courts Act, which read as follows:

‘When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

[17] The proper approach to the consideration of the issue of mootness is set out in *Narius Moloto v The Pan Africanist Congress Of Azania*⁵ in the following terms:

‘[13] On the issue of mootness I accept, as it was common cause between the parties, that the relief sought in this appeal has been overtaken by events. This Court in *The President of the Republic of South Africa v DA and Others*⁶ had this to say on the issue:

‘The question of mootness of an appeal has featured repeatedly in this and other courts. These cases demonstrate that a court hearing an appeal would not readily accept an invitation to adjudicate on issues that are of “such a nature that the decision sought will have no practical effect or result”. The Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21 footnote 18 remarked:

⁵ *Narius Moloto v The Pan Africanist Congress Of Azania* (1176/2019) [2023] ZASCA 140 (27 October 2023).

⁶ *The President of the Republic of South Africa v Democratic Alliance and Others* [2018] ZASCA 79 paras 11-12. See also the case of *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) at para. 27; *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exploration SOC Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) paras 46-50.

“A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599), where Didcott J said the following at para [17]:

“(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become.”

There are instances where there have been exceptions to the provision, initially of s 21A of Act 59 of 1959 and presently s 16(2)(a)(i) of the Superior Courts Act 10 of 2013. The courts have exercised a discretion to hear a matter even where it was moot. This discretion has been applied in a limited number of cases, where the appeal, though moot, raised a discrete legal point which required no merits or factual matrix to resolve. In this regard, the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), in paragraph 11 held:

‘A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others.’

The question is thus whether such discretion should be exercised in this case.”

[18] This case falls within the exception to the rule that if any order that the court may make is moot it will decline to adjudicate the matter. The dispute arising from the appellant’s application for a declarator that the civil marriage is invalid is the allegation that there was a customary marriage in existence between T[...] and A[...] that vitiated the status of the civil marriage. The relief sought that T[...] be deprived of the benefits of the civil marriage is a consequential relief that has less to do with any pronouncement by the divorce court. The provisions of s 21(1) (c) of the Superior Courts Act underscore the fact that the divorce order granted in the regional court is irrelevant to the declaratory order sought by the appellant in the high court. They read:

‘(1) A Division has jurisdiction...

...

(c) in its discretion, and at the instance of any interested person, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination’.

[19] The determination of the issue of inadmissible evidence of payment of *lobola* cannot detain this Court because it is the flip-side of the issue of whether further evidence ought to be received on appeal. Suffice it to state that the ruling by the *court a quo* that the evidence that T[...] had paid *lobola* for his marriage with A[...] was inadmissible hearsay cannot be faulted⁷. It must also follow, therefore, that the claim by the appellant that T[...] and A[...] were involved in a customary marriage at the time when she and T[...] entered into a civil marriage on 1 October 1997 is incorrect.

[20] The costs of both the application to lead further evidence and the appeal will follow the result.

In the result,

1. The application to lead further evidence is dismissed with costs.
2. The appeal is dismissed with costs.

B MAJIKI

JUDGE OF THE HIGH COURT

⁷ It was held in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), para 28 that if the declarant/source person is not called the hearsay is ‘left out of account’. See also: *S v Litako and Others* 2012 (1) SA 90 (SCA, para 23; and *S v Mhlongo*; *S v Nkosi* 2015 (2) SACR 323 (CC).

I agree

Z M NHLANGULELA
 ACTING JUDGE PRESIDENT
 OF THE HIGH COURT

I agree

S TILANA-MABECE AJ
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