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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20605/2022

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

(4) Date: 08 June 2023

Signature:

In the matter between:

KEDIBONE MOTSHEGOA

Applicant

And

GOVERNMENT EMPLOYEE PENSION FUND

1st Respondent

MINISTER OF SOUTH AFRICAN NATIONAL

DEFENCE FORCE

2nd Respondent

ANNA RAISIBE SHADUNG

3rd Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] The applicant was granted an urgent interdict, prohibiting the first and second respondents from making a payment of pension fund interest of the late Lesetja Peter Shadung (“the deceased”) to the third respondent. This hearing is to determine whether the *rule nisi* issued and extended a few times, should be confirmed, or discharged. This application is opposed by the third respondent.
- [2] The applicant instituted the above application in her capacity as a surviving spouse of the deceased since they were married in terms of customary law. In support of the said customary marriage the applicant relies on a court order issued by the regional court at Moretele. The said order declares that the applicant and the deceased had entered into a customary marriage and orders the Department of Home Affairs to register the said customary marriage. The court order is annexure KB4.

B. BACKGROUND

- [3] On 09 July 2016, the third respondent together with other family members went to Makapanstad to the applicant’s parental home to introduce themselves and to inform them of their son (the deceased)’s, intention to marry the applicant.
- [4] The Applicant’s family told them the bride price which was to be paid and listed things and accessories which were to be brought together with the lobola so they could finalise the union between their children and the two families.
- [5] Two minor children were born namely, O[...] M[...] on 07 February 2015 and G[...] M[...] on 05 December 2018. Their birth certificates are on annexure KB5 and KB6.
- [6] On the 20th of March 2019, Peter Lesetja Shadung passed away without leaving a testament. A death certificate marked KB3 is annexed.

- [7] The deceased was employed by the second respondent at the time of his death and was therefore a contributing member of its pension fund.
- [8] The versions of the applicant and the third respondent diverge at this point. The applicant alleges that the family of the deceased visited her parental home again on the 11th of December 2016 to finalize the lobola process and paid the balance of R24,000-00. The applicant relies on annexure KB2 which reportedly records the activities and payments made on the 11th of December 2016. She further relies on annexure KB7 which is an affidavit made by the third respondent at a police station confirming the negotiations of the 11th of December 2016. The applicant alleges that this affidavit was made by the third respondent to facilitate the payment of burial benefits in preparation for the funeral of the deceased. The applicant's mainstay for her application is the court order issued by the regional magistrates' court Moretele, which declared her marriage to the deceased a valid customary marriage. All the foregoing is however, vehemently denied by the third respondent.
- [9] The third respondent contends that a marriage never occurred. Fraudulent documents were submitted as evidence of the customary marriage and the payment of lobola. She denied ever paying the amount of lobola.
- [10] Interestingly the third responded acknowledges that the applicant visited the deceased on the weekend before his passing. This can only show that the bond between the applicant and the deceased existed until the very end almost. At any rate, applicant's version is that all along she and the deceased had their own household since they were married.
- [11] Mr. Mohlake submitted that the applicant has proved that she is married to the deceased. She lodged a claim with the SANDF, she was advised the said

respondent also came and lodged a claim the applicant then obtained an interdict.

[12] Mr. Mohlake Stated that the applicant has demonstrated a *prima facie* right. She has two minor children with the deceased, she is unemployed and that the GEPF Act categorizes customarily married spouses as beneficiaries. He then questioned the legitimacy and authenticity of the nomination form in the said respondent's possession. He further submitted that the court order by the regional court carries more weight than the nomination form. He concluded that the applicant has proved she has a clear right and the court should confirm the rule *nisi*.

[13] Mr. Mokwena Commenced by stating that when the interim order was granted the applicant had to prove a *prima facie* right for a final order such as the confirmation of the rule *nisi*, she needs to prove the existence of a clear right. The basis of her rights is the regional magistrate's order, which is being challenged by the third respondent.

[14] Mr. Mokwena submitted that the third respondent has prepared an application for the rescission of the judgment given by the regional court Moretele. She wants to have it set aside as she was not aware that such an application was ever made, and she did not get the opportunity to oppose such application.

[15] Dealing with the balance of convenience, Mr. Mokwena said that the applicant's case is that she and her children are dependent on the GEPF. She has an alternative of claiming against the deceased's estate for maintenance. The balance of convenience favours the third respondent, and the application should be dismissed.

C. THE LAW GOVERNING CUSTOMARY MARRIAGES

[16] Section 3 of the Recognition of Customary Marriages Act 120 of 1998 provides that *for a customary marriage to be valid;*

a) *The prospective spouses must both be above the age of 18 years;*

i) *Both consent to be married to each other under customary law.*

ii) *The marriage must be negotiated and entered into or celebrated in accordance with customary law.*

D. DISCUSSION

[17] Paragraph [14] above deals with the intended application to rescind the order by the regional magistrate. Regional magistrates' courts have jurisdiction to hear matters relating to the nullity of a marriage or a civil union and divorce matters between persons and to hear matters provided for in terms of the Recognition of Customary Marriages Act 120 of 1998.

[18] It follows therefore, that until the regional court order has been set aside or rescinded by an appropriate court order, it remains valid and enforceable.

[19] In this application, the rule nisi was granted on the 23rd of June 2022. It was then extended to 22 August 2022 by Madam Justice Janse van Nieuwenhuizen. On 22 August 2022 the rule nisi was extended to 10 October 2022 by Thlapi J. In the meantime, on 03 August 2022 an application that was set down before the regional court Moretele was dismissed with costs by Magistrate Sono TG. On 13 October 2022 Swanepoel AJ (as he then was) postponed the matter and extended the rule nisi to the 6th February 2023. The matter served before me on the 8th of February 2023. In all the above instances costs were reserved.

[20] As at the time I heard this application, the regional magistrate's order had not been rescinded or altered in any way. This is despite all the postponements listed above.

[21] It therefore is both futile and incompetent for me to decide on the validity or otherwise of the customary marriage.

[22] The only thing that comes up for consideration is the issue of costs. It has been submitted that the third respondent is a senior person aged ninety-eight (98) years. I take heed of the guidance of the Constitutional Court that persons should not be deterred from enforcing their rights before the courts because they fear that they will have to pay their opponent's costs as well as their own costs if they should fail.¹

[23] In the circumstances, the following order is justified.

The rule nisi is confirmed. The first respondent is ordered to comply with applicable legislation, in particular section 37C of the Pension Funds Act 24 of 1956² and investigate who the dependents and nominees of the deceased are and distribute the benefits to them accordingly.

I make no order as to costs.

J.S. NYATHI

Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 08 June 2023

Date of hearing: 08 February 2023

On behalf of the Applicant: Adv. K. Mohlake

¹ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)

² Section 37C regulates the payment of death benefits with the primary objective of ensuring that those persons who were dependent on the deceased member are not left destitute after his/her death, irrespective of whether or not the deceased was legally required to maintain them.

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