

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: 09 June 2023

Signature:

In the matter between:

JESSIE KEDISALETSE NTHUTANG

Plaintiff

And

MAGADI BERNICE PHETLU

1st Defendant

GOVERNMENT EMPLOYEES PENSION FUND

2nd Defendant

GOVERNMENT PENSION ADMINISTRATION AGENCY

3rd Defendant

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The matter first came to life as a review application on the same facts before this court. The relief sought similarly was the same. A material dispute of fact shrouded the application which could not be resolved on paper, prompting Her Ladyship Kubushi J to exercise her discretion and refer the matter to trial. The matter is before me as a result.

- [2] The issue to be determined is whether the first respondent was a customary marriage spouse to the applicant's deceased husband, Dibe Jacob Nthutang, and thereby entitled to share in his pension benefits.
- [3] The pleadings filed on record are to serve as the pleadings at this trial and the parties were given leave to file any pleadings which may be considered as necessary to take the process to the conclusion of the trial.
- [4] Costs were reserved for determination at the trial.

B. PLAINTIFF'S VERSION OF EVENTS

- [5] Mr. Tyatya called the first witness Ms. Jessie Kedisaletse Nthutang the plaintiff.
- [6] She testified that she is a teacher by profession. She and Dibe Jacob Nthutang got married on 11 December 1999 as evidenced by a marriage certificate which was handed in. Jacob died on 02 April 2017. This date was confirmed in a death certificate which was handed in as an exhibit. Out of the marriage two children were born namely, a set of twins who are a boy and a girl. The couple stayed together until the deceased died.
- [7] Miss Nthutang and the deceased met in 1995 at Potchefstroom where they both worked. At the time the deceased resided in a military base as he was a soldier.
- [8] After they met and fell in love, she used to visit him as he had a flat because he was an officer. Between 1995 and 1999 he was never sent to work elsewhere in another district or town. During that time, they shared a lot of personal things and information. He told her that he had children and took her to his parental home. She met the children who were close to the deceased.

- [9] He had four children when they started out, he then had a fifth one during that time. The children are Pelo, Bonolo, Tshegofatso, Duncan and Letlhogonolo.
- [10] Tshegofatso's surname is Phetlo, she is the daughter of the first defendant in this matter and bears her surname. This child is known and acknowledged by the plaintiff as the deceased's dependant.
- [11] According to the plaintiff, before she and the deceased got married (i.e., 1995 to 1999), the deceased did not have any relationship with the first defendant. He never told her of having paid lobola any other woman. He had no secrets.
- [12] If the first defendant were to say that before the deceased met the plaintiff, he had already paid lobola to her, she would dispute it. She is properly married to the deceased who paid lobola and married her at a church service. During the church service, the priest asked if anyone had any objections, and that they should speak up or forever keep their peace and no one objected.
- [13] In 2018 the plaintiff found out that there is somebody who claimed to be the deceased's wife. She noticed this because the Government Employee Pension Fund ("GEPF") stopped paying the deceased's pension benefits to her.
- [14] When the deceased passed on, the plaintiff was the one who went to identify his body. She also sat on the mattress to customarily symbolize that she was the chief mourner. There were no challenges during the burial.
- [15] The plaintiff was made to wear the mourning garb, and eventually participated in cleansing rituals after six months as is customary.
- [16] The deceased had a will wherein he had bequeathed 100% of benefits to the plaintiff. The latter submitted completed claim forms to the SANDF and was paid out an amount of R1,6 million.

- [17] During October 2018 the plaintiff did not receive any monies from the GEPF and on inquiring, she was told that there is somebody who had put in a claim that she was the customary wife of the deceased. A staff member from GEPF, one Mr. Makgatikele from GEPF forensics came to inform her.
- [18] The GEPF failed to inform the plaintiff that the money she would be receiving hence forth would be proportionally reduced. She did not get a written explanation prior. She went to GEPF on several occasions without success until she hired a lawyer.
- [19] After the plaintiff's lawyer demanded a file from the GEPF, she saw among the documents a letter containing identity numbers purporting to confirm payment of lobolo. It was allegedly signed by Dr. Lesego Clement Nthutang, the brother of her late husband. A handwritten note was handed in as an exhibit and is marked "KJN 16".
- [20] Dr. Lesego Nthutang was around 18 or 19 years on the 24th of April 1990 when the alleged lobola was paid.
- [21] The plaintiff reported this matter to the police. This is because she was not satisfied with developments regarding the supposed customary wife and how easily the GEPF took money meant for her.
- [22] Lesego is the last born in the Nthutang family, he was unmarried at the time, and so by custom did not qualify to partake in lobola matters. The plaintiff's suspicions were awakened. The police told her that they would refer this matter to the Hawks. As the police investigations progressed, another lobola letter emerged.

[23] The second witness to testify on behalf of the plaintiff was Johannes Kgotle Nthutang. He testified that the deceased is his brother. He did not know of anyone who his late brother paid lobola to except the plaintiff. His brother told him everything that he did but he does not remember his brother telling him that he had paid lobola for the first defendant. According to him no Nthutang family members went to pay lobola for the first defendant in 1990. The testimony of Johannes Kgotle Nthutang concluded the evidence on behalf of the plaintiff.

C. DEFENDANT'S VERSION OF EVENTS

[24] Mr Ramosala Matthews Molete was the first witness to testify on behalf of the first defendant. He testified that he knew the Nthutang family very well. During April 1990 he was approached by the deceased's mother to lead a delegation to go and pay lobola on behalf of the deceased to the Phetlhu family. He obliged and on 28 April 1990 he, his wife Mrs Molete, Mr. and Mrs Mosethle set forth to the Phetlhu family and went to pay lobola as requested by the Nthutang family. Mr. and Mrs Mosethle have since passed on. They paid the Phetlhus an amount of R1200.00 as lobola as per prior negotiations. He testified further that gifts were exchanged between the two families; they had a celebratory feast and left to report back to the Nthutangs. The occasion took place on a Saturday.

[25] Magadi Bernice Phetlhu, the first defendant, testified that she and the deceased met whilst working in the army of the old Bophuthatswana Government. A few weeks before her customary marriage to the deceased, the deceased's family went to her home to inform her parents about the deceased's plans to marry her and to enquire about her family practices and expectations regarding a customary marriage.

[26] She further testified that on 28 April 1990 the Nthutang delegation arrived at her home to pay lobola for her. The delegation comprised of two men and two

women who were Mr Molete and his wife and another couple. There was also a delegation of her family's side which received the delegation from the Nthutang family. As custom dictated, she was not part of the process. She only got involved when she got introduced to the Nthutangs' delegation when she was formally handed over to the Nthutangs' family after the payment of lobola and the exchange of gifts. She stated that it was early in the morning, and it was still dark.

[27] She testified further that later that evening the deceased arrived and as per tradition they were served with a dish which comprised of a certain portion from the slaughtered sheep which she and the deceased had to eat together. This customary gesture was to solemnize their customary union and they were declared free to be together as husband and wife. She did not know how much was paid as lobola for her and did not take interest in that as all she was interested in was the fact that she was married to the deceased.

[28] She testified further that after the lobola ceremony her mother-in-law invited her over to the Nthutang homestead to assist with the preparations of the wedding ceremony of one of the deceased's sisters. To this end she was accompanied by her aunt, Mrs Gopane, to her in laws' residence.

[29] She and her husband lived as husband and wife in Motlhabeng village, although they worked at different areas. In 1999 whilst deployed at Walmansthal Military Base, a friend of hers one Ouma Makona (now deceased), called and informed her that the deceased was getting married to another woman. She confronted the deceased who did not deny the allegations. Despite these new developments she continued to embrace the deceased as her husband.

[30] Her husband passed away in 2017 at the time they had one child, Tshegofatso. She testified that in 2017, she learned through a SANDF publication, *Noticias*,

that the deceased had passed on. That she was not party to his burial and that the military contacted the second wife. That she knew that the deceased was staying with the plaintiff.

[31] She thought that she was not entitled to claim and share in the deceased's estate as she was only married to the deceased customarily, however, upon being advised that she was entitled to do so she then started to set the claim process in motion which culminated in her being paid certain amounts by the GEPP, from January 2019 until October 2021. The payments were subsequently stopped for reasons unknown to her.

[32] In augmenting her claim with the GEPP, she also submitted certain affidavits which were deposed to by people who witnesses and bear knowledge of the fact that she was customarily married to the deceased.

[33] Samuel Jantjie Manyedi was the next witness to testify on behalf of the first defendant. He testified that he is the first defendant's uncle. He was present when the first defendant was customarily married to the deceased. He was part of the delegates who welcomed the Nthutangs' delegation to the Phetlhu home on 28 April 1990. Wilfred Manyedi, his elder brother, was the leader of the delegation from the Phetlhus' side. This event happened between 1am and 4 am in the morning. They were done by 4h30 am and the guests left at that time.

[34] As Magadi was pregnant, the first thing on the agenda for discussion was payment for that pregnancy. This payment is known as Thobela. They paid money as symbolizing a sheep. He is however not clear of the amount; it may have been R100.00.

- [35] The second issue is “Mokwele¹”. The practice being that once the Mokwele is out, a marriage has come into existence. This Mokwele had to be checked for signs of castration as well as its tail. The one brought along by the Nthutangs was good. The Mokwele must be slaughtered before it can urinate in the kraal. A portion around the ribs is then cut to be eaten by the newly-weds.
- [36] Mokwele is an engagement. The third step is called “Patlong”. That role is done by the woman delegation. Bed and clothes are handed over. The women reported that this process had been fulfilled.
- [37] He further testified that certain traditional practices according to their culture were observed which were followed by the payment of the lobola amount, which was received by his late brother, Wilfred Manyedi. The lobola amount was R1200.00. This amount symbolizes six head of cattle, this tariff was set at the tribal office. Bedding and clothes were handed over.
- [38] As already alluded to above, the Nthutang delegation brought along a sheep which was slaughtered in observance of their cultural practices in ceremonies of this nature. According to this witness the slaughtering of the sheep was the main major symbolical indication that the first defendant was lawfully customarily married to the deceased.
- [39] He also witnessed the writing of documents which was evidence of how much was paid as lobola for the first defendant. Although his signature does not appear on those documents, he witnessed them. His elder brother, who was the leader of the delegation on behalf of the Phetlhu family appended his signature on those documents. One document was handed over to the Nthutang family and the other document remained with the Phetlhu family.

¹ A sheep slaughtered at betrothal feast by the bride's family.

[40] He was cross-examined by Mr Tyatya on behalf of the plaintiff. He was shown his 2018 affidavit marked KJN 8, wherein he stated that they received R600.00, he responded by saying that that was a mistake. On being shown annexure KJN 16, he testified that his signature does not appear on the lobola note alleged to have been written by his brother Michael. Further that there is nowhere where the Nthutang delegation signed.

[41] Maphiri Eunice Louisa Legae was the last witness to testify on behalf of the first defendant. She told the court that she is a blood sister to the deceased. She knows the first defendant as her sister-in-law whom the deceased married on 28 April 1990. She witnessed this event as she was already 26 years old then.

[42] She further testified that in 2018 she was approached by members of the South African Police Services who wanted to get certain information from her about the issue of the customary marriage between the deceased and the first defendant. Pursuant to this investigation, she searched the places where her late mother used to put all their family documents. She ultimately found a document in her mother's briefcase, which was a lobola letter which was prepared when the deceased and the first defendant got married to each other customarily. She handed it over to the police.

[43] She further told the court that her brother, Johannes Kgotle Nthutang, was lying when he told the court that the deceased was not customarily married to the first defendant.

D. DISCUSSION AND ANALYSIS

[44] The Recognition of Customary Marriages Act 120 of 1998 specifies requirements for a valid customary marriage. A customary marriage that is concluded after the coming into operation of the Act, is valid if the bride and groom are over the age of 18 years, both consent to the marriage, and the

marriage is negotiated and entered into or celebrated in accordance with customary law.

[45] At this point the first defendant's version runs into difficulties regarding the consent to be married to each other under customary law and on the aspect of celebration of the marriage in accordance with customary law.

[46] From her own version in her opposing affidavit, the first defendant clearly knew that the deceased had married the plaintiff² without even notifying her of this fact.

[47] The first defendant and the deceased were not living together as husband and wife. She states in her opposing affidavit that the deceased had been transferred to the Potchefstroom base and therefore close to the plaintiff. Further that the deceased had stopped visiting her in 2012 and they could no longer see each other.

[48] The first defendant states in her opposing affidavit that she could not remember the exact date of her marriage and the amount of lobola that was paid for her. According to her, her elder sister Thelma Seremo, insisted that the marriage was on 24 April 1990 and the amount paid as lobola was R600.

[49] The first defendant alleges that she was handed over to the family of the deceased as a *makoti*³ the same day. There is no evidence for this.

[50] Dr. Lesego Clement Nthutang who allegedly penned the note acknowledging the payment of lobola was not called to testify in the hearing for purposes of corroboration and being subjected to cross-examination.

² Opposing/Answering affidavit Para 2.9 and 2.10

³ A bride.

[51] The first defendant states in her opposing affidavit that her marriage took place almost two months before the birth of her daughter, Tshepang Tshegofatso Phetlhu, who was born on 22 June 1990. On the evidence, it becomes apparent that this ceremony was most likely a ceremony whereat damages for the first defendant being impregnated out of wedlock was negotiated and paid. The relatively paltry amounts paid seem to support that assumption. Tshegofatso was born two months after the marriage as put forth by the first defendant, yet she carries her mother's surname which is at odds with the customary practice.

[52] The plaintiff and the deceased got married on 11 December 1999, and the second defendant became aware of this marriage soon thereafter. This was courtesy of a friend who is now deceased. The second defendant had not given her consent for the deceased to marry the plaintiff. This therefore means that for 17 years she did nothing in relation to this marriage. In my view she did not raise any tangible objection to this civil marriage because she was not customarily married to the deceased throughout this period. For the same reason the deceased did not approach her for any consent because he did not consider himself to be customarily married to the second defendant.

[53] It is the second defendant's case that from the year 2012 she could no longer see the deceased as he stopped visiting⁴ her, seemingly until he died in 2017. She also did not attend his funeral, yet she somehow gained motivation to file papers to contest for the deceased's pension benefits after he died.

E. CONCLUSION

[54] The balance of probabilities in this matter does not indicate the existence of a properly constituted customary marriage at all but a convenient scheme

⁴ Para 2.12 of 2nd Defendant's "opposing" affidavit.

contrived as an afterthought by the second defendant. Consequently, the plaintiff must succeed.

[55] The issue of costs falls to be decided next. I cannot find any reason to depart from the standard approach that costs must follow the outcome of the action.

[56] The following order is made:

1. That the first defendant was not customarily married to the deceased Jacob Dibe Nthutang, and thus not entitled to his pension benefits held by the second defendant and managed by the third defendant.
2. That any purported marriage between the first respondent and the deceased is declared null and void.
3. That the defendants are ordered to pay the costs of this matter jointly and severally, the one paying the others to be absolved, on an attorney and client scale.

J.S. NYATHI

Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 09 June 2023

Date of hearing: 21 October 2022

On behalf of the Plaintiff: Adv. L. Tyatya

Instructed by: Masike Inc Attorneys

On behalf of the First Defendant: Adv. C. Mnisi

Instructed by: Tladi L.B. Attorneys; Mamelodi East

c/o Nkadameng Inc. Attorneys

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 09 June 2023.