

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal Case number: A101/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

XOLILE MACDONALD YAWA

First Appellant

THEMBANI YAWA

Second Appellant

NONGUYO YAWA

Third Appellant

MASTER OF THE HIGH COURT

Fourth Appellant

C BROWN

Fifth Appellant

(In his capacity as Sheriff Welkom)

and

MATLAKALA MARIA TSOEUTE

Respondent

HEARD ON:

24 MARCH 2023

CORAM:

MBHELE DJP, BERRY AJ and JONASE AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 13 JUNE 2023. The date and time for hand-down is deemed to be 13 JUNE 2023 at 15h00.

INTRODUCTION

- [1] This is an appeal against judgment of a single judge of this division with the leave of the Supreme Court of Appeal.
- [2] The issues on the appeal are:
- a) Whether a valid customary marriage was concluded between the Respondent and the late Mthuthuzeli Martin Yawa, “the deceased,” who is the late father to first, second and third Appellants’ (‘the Appellants’), and
 - b) whether the Respondent is entitled to be appointed as the executor of the deceased estate.

FACTUAL BACKGROUND

- [3] The crux of the matter commenced when the Respondent was served with a letter dated 9 February 2019 from the Appellants’ then attorney requesting the Respondent to vacate the house situated at 4[...] S[...] Avenue, R[...], Welkom, where the Respondent was residing with the deceased until his death on 28 November 2018.
- [4] On 26 June 2018, the Respondent’s attorneys provided the Appellants’ attorney of record with a copy of a document termed ‘lobola agreement’ as proof that a valid customary marriage between the deceased and the Respondent was negotiated in terms of the customary law.
- [5] On 16 August 2018, the Appellants attorneys sent a letter which read as follows:

“We acknowledge receipt of your email of the 2nd July 2018 sent at 15:59 to which was annexed your letter of the 28th June 2018.

We apologise for not responding thereto.

We regret to advice that your client has unfortunately not entered into a valid marriage with the result that she has no claim to any inheritance and/or

ownership of whatsoever nature.

We further wish to advise that the family is denying any allegations by your client as their family's consent to a relationship and/or the payment of any lobola.

The crux of the matter the Lobola relation was not registered and any claim to a marriage is thus null and void.

In view of the abovementioned, we hereby request that your client vacate the house not later than the 31st August 2018 and to hand over the car and other movable assets to the family.

The relative arrangements in respect of the latter can be made through the writer hereof.

We further call on your client not to remove any assets of the deceased and neither to cause any damage to the property and/loose assets.

We await your response."

- [6] It seems from the said letter that the validity of the marriage is disputed only on the basis that the marriage was not registered.
- [7] The Respondent then brought an application for a declaratory order that she be declared, among other prayers, a lawful surviving spouse of the deceased.
- [8] The said order was granted by the court *a quo* and it is that order which is the subject of this appeal.

GROUND OF THE APPEAL

- [9] The Appellants' grounds of appeal are that the court *a quo* erred in not considering and/or finding that the Respondent did not make out a case for the relief sought and more specifically that:

9.1. No confirmatory affidavits or proof in the Founding papers were attached by the Respondent pertaining to the representatives of her family confirming that there were lobola negotiations held between the two families.

9.2. No confirmatory affidavits of the Respondent's elders or proof that the Respondent was accompanied by her family to the deceased's house on 21 November 2015 were attached to the founding affidavit.

9.3. No evidence has been presented in the founding affidavit that the customary marriage was ever concluded, how it was entered into and/or celebrated or that the bride was handed over.

9.4. That the Respondent bears the onus to prove her allegations, that the Respondent did not state to which ethnic group she belongs and what the rituals of a customary marriage should accordingly be.

9.5. That the Respondent attempted to make out a case for her relief sought in the replying affidavit whilst same should have been done in the founding affidavit.

9.6. The court *a quo* erred in not finding that a bona fide dispute of fact exists which cannot be properly determined on the papers in that:

9.6.1. The Respondent, in reply, proffered alleged proof in a form of three confirmatory affidavits that the customary marriage existed, whilst the applicants also proffered three affidavits that the customary marriage did not exist, thereby constituting a bona fide dispute of fact.

9.6.2. The dispute of fact was foreseen by the Respondent in her admission that the applicants demanded that she vacates the house where she was staying.

9.6.3. The dispute of fact was foreseen in terms of annexure "J" to the founding affidavit, whereby the applicants unequivocally state:

9.6.3.1.1 "We regret to advise that your client has unfortunately not entered into a valid marriage with the result that she has no claim to any inheritance and/or ownership of whatsoever nature.

9.6.3.1.2 We further wish to advise that the family is denying the allegations by your client as to their family's consent to a relationship and /or payment of any Lebola."

9.7. The court *a quo* erred in finding that the applicants persisted with the argument that the marriage needs to be registered at home affairs to be valid, whereas the aforesaid requirement for validity was conceded in argument and in the opposing affidavit of the 1st Applicant.

9.8. The court *a quo* erred in placing too much emphasis on the registration of the customary marriage whereas the applicants argued that:

9.8.1 No marriage ceremony and/or celebrations were ever held.

9.8.2. There was no handing over of the bride.

9.8.3. There was no consent to marry.

9.9. The court *a quo* erred in finding that the Applicants papers were full of bare denials.

9.9.1. Not taking into consideration the Applicants argument and contention that one cannot present evidence to something which never existed in the first place.

9.9.2. That the Applicants presented evidence that the deceased listed the Respondent in annexure "XY5" to the opposing affidavit as "friend" under the heading "next of kin" thereby amplifying the applicants' contentions that a customary marriage never existed.

9.9.3. That annexure "C1" to the founding affidavit described the Respondent as "partner" and not spouse, thereby creating further disputes of fact and supports the Applicants contention that the customary marriage never existed.

9.10. The court *a quo* erred in not drawing an inference of fraud and forgery pertaining to Mr Moekeni Abram Yawa's signature as the said Mr Yawa states under oath I annexure "WY2" to the Answering Affidavit:

" I never had any discussions regarding lobola matters between her and Mthuthuzeli and that I do not know her or the whereabouts of their parents."

9.11. The court *a quo* erred in finding that Mr Abram Yawa should explain how his signature appeared on the lobola agreement, as he had already explained he had no discussions regarding lobola.

9.12. The court *a quo* erred in finding that Mr Abram Yawa does not deny that he was present at the negotiations, whilst he does deny any knowledge of lobola discussions or knowledge of the identity of the Respondent.

9.13 The court *a quo* erred in finding that the Applicants dispute the Respondent's reliance on the Administration of Estates Act 66 of 1965 as bad in law as:

9.13.1. The Respondent did not rely on the Act or on any legislation in support of the relief sought in the Founding Affidavit or Replying Affidavit pertaining to the removal and nomination of the executrix.

9.13.2. The Respondent therefore did not establish a cause of action for the relief sought.

9.13.3. It is submitted that the Respondent's eventual reliance on Sec 19 of the Administration of the Estate Act is bad in law only raised in argument with no basis, therefore.

9.13.4The court *a quo* erred in finding that the Respondent should be nominated as Executrix of the deceased estate as the 1st applicant was already appointed after nomination.

9.14. The court *a quo* erred in not considering that Sec 54 of the aforesaid Act was the relief that should have been sought by the Respondent as same deals with the removal from office of executrix. The Respondent never prayed for such relief.

9.15. The court *a quo* erred in removing the 1st Applicant as executor of the deceased estate without any evidence being proffered that the 1st Applicant conducted himself in such a manner that it imperilled his proper administration of the estate.

9.16. The court *a quo* failed to consider that bad relations between an executor and an heir cannot lead to the removal of the executor unless the administration of the estate would be prevented as a result.

9.17. The court *a quo* failed to take into consideration that the appointment of the executor vests in the Master. The court *a quo* erred in not referring the appointment back to the Master after the removal of the 1st Applicant.

ISSUES OF THIS APPEAL

[10] The issues are rooted in the grounds of appeal as indicated above.

[11] The genesis of this Application, in the court *a quo*, is based on the allegation that the alleged lobola agreement was not registered and any claim to a marriage is thus null and void.

[12] What is now clear, is that the dispute is about the validity of the alleged lobola agreement which gave rise to the alleged customary marriage.

[13] It is so because the Appellants rely, over and above, on the denial of the signature of one Abram Yawa which appears on the lobola agreement and that he was present during the alleged lobola negotiations.

- [14] The Appellants argued that it is not the existence of the romantic relationship between the Respondent and the deceased that is in dispute, but the exact nature of their relationship.
- [15] The Appellants submitted that the issue of whether there was a customary marriage should be based on section 3(1) of the Recognition of Customary Marriages Act 120 of 1998¹ (the Act)
- [16] The Appellants further argued that to the extent that the Respondent relied on the customary marriage, the Appellant raised a genuine and *bona fide* dispute of fact regarding the existence of and/or the validity of the alleged customary marriage.
- [17] Appellants further argued that if there is a dispute of fact regarding the marriage lobolo agreement, it follows that there is a genuine dispute of fact about the validity of the alleged customary marriage.
- [18] The Respondent argued that the lobola agreement is the determining factor in this matter.
- [19] The Respondent further argued that in line with the lobola agreement of 21 November 2015, the Respondent was accompanied to the deceased's house by her family's elders, an averment which is denied by the Appellants.
- [20] Mr Phalatsi argued, on behalf of the Respondent, that the said bare denial is in line with the averment in the letter dated 16 April 2016 from the Respondent's then attorneys which stated:

"The children had absolutely no relationship with the deceased and they do not visit him."

- [21] Mr Phalatsi further argued would the Appellants have known that the events of 21 November 2015 took place and more so, the lobolo agreement provides that the Respondent and the deceased are people of age who had been married before, they can deal with their own affairs the way they deem fit. That

¹ The Act

demystified the allegations that there was no compliance with the provisions of section 3(1) of the Act.

ANALYSIS

[22] The Recognition of Customary Marriages Act governs customary marriages. Sec 3(1) of the Act provides that:

(a) The prospective spouses-

(i) *must both be above the age of 18 years, and*

(ii) *must both consent to be married to each other under customary law; and*

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

[23] Sec 4 provides for the registration of customary marriages. However, Sec 4 (9) provides that:

“Failure to register a customary marriage does not affect the validity of that marriage.”

[24] The gist of this matter is the dispute about the existence of a valid customary marriage. The initial dispute was that the said marriage was not registered and as such is null and void. This averment is totally misplaced and ill-conceived².

[25] The court *a quo* satisfied itself that the said marriage was valid and celebrated in line with the lobola agreement. It was also submitted for the Respondent that on 21 November 2015 Respondent was accompanied by the elders to the deceased's house in compliance with the lobola agreement. There was no evidence to gainsay this. The agreement also provided that as elders who were previously married, the Respondent and the deceased are at liberty to deal with their affairs the way they deemed fit.

² Section 4(9) above

- [26] The Appellants could not advance any argument or produce any evidence which contradicts the Respondent's version. The Confirmatory Affidavit of Abram Yawa, as one of the signatories of the lobola agreement, addresses unrelated issues to the dispute alleged by the Appellants.
- [27] The first Appellant alleged that he had been informed by his uncle, Abram Yawa that his signature must either have been obtained from another document or is a forgery as no lobola agreement was ever drafted to which he was a signatory. Yet, Abram Yawa did not indicate as to how his signature ended up on the lobola agreement.
- [28] Abram Yawa does not deny that it is his signature appearing on the lobola agreement, neither does he confirm the allegations made by the first Respondent. The first Respondent and Abram Yawa deny the lobola negotiations, which is not supported by the available evidence.
- [29] The denial by the applicant that a valid marriage was concluded between the parties is unsubstantiated. There was compliance with section 3(1)(a), (b) and (c) of the Act.
- [30] The requirements of the customary marriage between the Respondent and the deceased have been complied with and as such the Respondent should be regarded as the deceased's only surviving spouse.
- [31] The Appellants did not raise a genuine and bona fide dispute of fact on whether there was a valid customary marriage concluded between the deceased and the Respondent. It was submitted for the Respondent that it was not foreseeable to the Respondent that after the production and delivery of the lobola agreement then the dispute about the validity of the customary marriage would persist. Their initial dispute was centred around the registration of the lobola contract, it was never about the existence of the contract itself. The alleged dispute of fact is farfetched and untenable³.

- [32] Section 7 of the Act reads:

³ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) [1984] (3) SA 623 (A)

“7. (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 (Act No. 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).”

[33] It is clear from the provisions of Sec 7 of the Act that the Respondent’s marriage is in community of property and of profit and loss. The Respondent has a fifty percent interest in the deceased’s estate which qualifies her to be appointed as the executrix. The appointment of the first Appellant was done without consultation with the Respondent in violation of the Administration of Estates Act 66 of 1965⁴. The court *a quo* correctly relied on the Administration of Estates Act when she replaced the first Appellant with the Respondent. We find no reason to interfere with the order made by the court *a quo*. The appeal ought to fail. As regards to costs, there is no reason to depart from the general rule that costs must follow the event.

[34] In the circumstances I make the following order:

1. The appeal is dismissed with costs.

JONASE AJ

I concur.

MBHELE DJP

⁴ Section 19 (a) of The Administration of Estates Act 66 of 1965 “If more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to- (a) the surviving spouse or his nominee.”

I concur.

BERRY AJ

On behalf of the Appellant:

Adv. L Mfazi

Instructed by:

Mlozana Attorneys

BLOEMFONTEIN

On behalf of the Defendant/Respondent:

Mr N Phalatsi

Instructed by:

NW Phalatsi Attorneys

BLOEMFONTEIN