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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 452/2021

In the matter between:

HLENGIWE NONTOSBEKO MAVUNDLA

Applicant

and

MUZI JONATHAN MTHETHWA N.O

First Respondent

LINDIWE CATHERINE ZUMA

Second Respondent

SINDISIWE LUNGISIWE MVELASE

Third Respondent

VUKA QINISO ZUMA

Fourth Respondent

SENZO ARNOLD MCHUNU

Fifth Respondent

SNUGUGU MIRONDER ZUMA

Sixth Respondent

SANDISWA SPHESIHLE MNGOMEZULU

Seventh Respondent

**MASTER OF THE HIGH COURT,
PIETERMARITZBURG**

Eighth Respondent

ORDER

The application is dismissed with costs.

JUDGMENT

Gwagwa AJ:

Introduction

[1] The applicant is Hlengiwe Nontobeko Mavundla who has instituted motion proceedings against the respondents. The case was on the opposed roll for argument on 11 October 2023 wherein the applicant sought the following;

[2] " Declaring that a valid customary marriage existed, in terms of section 3(1) of Act 120 of 2000, between the applicant and MBEZISENI MICHAEL ZUMA, who died on 17 December 2019, which subsisted until the deceased's death;

[3] Declaring that the said customary marriage propriety has consequences of a marriage in community of property and profit and loss, in terms of s 10(2) of the Act;

[4] Declaring that the Applicant and the first Respondent are both the deceased's surviving spouses in terms of customary law.

[5] Declaring that the deceased's Last Will and Testament, executed on 28 March 2015 (the Will) is invalid accordingly unenforceable, to the extent that it purports to bequeath the entire of the deceased's estate and property to his heirs;

[6] Declaring that the Applicant is entitled to claim or share one half of the deceased's estate and directing the first Respondent to take due cognisance or account of the Applicant's claim against the estate when preparing the

estate's liquidation and distribution account.

[7] Declaring that the remaining one half of the deceased estate is to devolve according to the laws governing intestate succession (the intestate Succession Act) and Estate Executrix (the first respondent) is directed to wind up the said estate accordingly;

[8] Ordering the First Respondent to pay the Applicant's costs of bringing the application, together with any other Respondent unsuccessfully opposing the application.

[9] Granting the Applicants such further and/or alternative relief as this Honorable Court may deem fit;

[10] That pending final determination of the application;

10.1 the Second Respondent is hereby interdicted and restrained from granting final approval to any Liquidation and Distribution account lodged by the First Respondent;

10.2 the First Respondent is hereby interdicted and restrained from winding up or otherwise effecting distribution of the deceased's estate, without the Second Respondent's final approval".

Nature of the application

[11] The application brought by the applicant is premised on the fact that the applicant was married to the deceased by customary union.

[12] The applicant sought to declare that a valid marriage existed in terms of s 3(1) of the Recognition of Customary Marriages Act¹ (the Act) between herself

¹ Recognition of Customary Marriages Act 120 of 1998.

and the deceased. Therefore, the main bone of contention of her application is premised on paragraph 1 mentioned supra.

[13] It is common cause that the applicant's application was vehemently opposed by the 1st, 2nd, 4th to 7th Respondents.

Issue for determination by this court

[14] Mbeziseni Michael Zuma (the deceased) married Mrs AB Zuma who was his first wife, by civil rights on 25 September 1988 (in community of property).² During the year 2010, the deceased and the applicant started dating each other, whilst the deceased was still married to Mr A B Zuma. It is alleged by the applicant that emissaries were sent to the applicant's family at Empangeni, KwaZulu-Natal, with the purpose of negotiating lobola on behalf of the deceased. It is further alleged that 11 cows were proposed for lobola, however cash in the sum of R65 500 was paid into the banking account of the applicant's mother.³

[15] The lobola negotiations and agreement ensued on or about 8 February 2012 and where after an upfront payment of R10 000 (as inkomo yokucela) was paid by the emissaries which was accompanied with two fruit-blenders and iscephu (meaning a grass mat) It is further submitted by the applicant that a goat was slaughtered, one half of the goat was given to the emissaries, whereas one half remained with the family of the applicant which also formed part of the customary marriage as submitted by the applicant's advocate Madikizela in his heads of argument. During 20 March 2014, the deceased bought an 18-carat white gold diamond cluster ring at the cost of R36 860..

[16] The deceased's wife, Mrs AB Zuma died on 15 December 2013.

² The marriage certificate appears at page 129 of index to Bundle B.

³ See annexure "NH2" on page 41 of index to Bundle A.

[17] On 24 September 2016, the third respondent and the deceased concluded a civil marriage with antenuptial contract excluding community of property. However, the validity of such marriage is challenged and subject to determination under case number D2088/2020 in this court. There is also a pending maintenance application under case number D3188/2020 filed by the third respondent against the estate of the deceased.

[18] The applicant further submits that the deceased secured a rented apartment at number 4[...] Z[...] Drive, Umhlanga, and paid an upfront deposit of R70000. Both the applicant and the deceased lived together at the rented property.

[19] The Respondents opposed the declaratory order or application which is sought by the applicant, on the basis that there was no customary marriage concluded between the deceased and the applicant. Furthermore, there were no members of the deceased's family who attended any of the customary rituals to which the applicant refers which would have required an obligatory attendance from the descendants of the deceased.

[20] The payments which are set out in annexure "NH2" reflect a payment of R62 500 which was paid into the account of Mrs DG Mavundla who is the mother of the applicant, such payment was for the allegedly lobola of the applicant.

[21] The deceased died on 17 December 2019.

The law

[22] Section 10(4) of the Act states the following:

'Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the *subsistence* of such marriage, competent to enter into any other marriage.'

[23] In the case of *Kambule v The Master and Others*⁴ where Pickering J stated in his judgment':⁵

'It is clear, however, in my view, that those provisions are prospective and not retrospective in effect. In *Mvunelo v Minister of Home Affairs (supra)*, Van der Byl AJ, in dealing with an argument that the provisions of s 10(4) were retrospective in effect, stated as follows at 13 - 14:

"In my opinion it is the aim of s10(4) of the Act to prohibit a party who is a spouse in a marriage entered into under the Marriage Act, 1961, to enter into any other marriage, which includes a customary marriage, obviously as from the commencement of that Act, i.e., as from 15 November 2000..."

[24] The submissions by the applicant that lobola negotiations ensued between her family and that of the deceased mentioned above is doubtful without there being compliance with s 3(1)(b) of the Act which provides that the marriage must be negotiated and entered into or celebrated in accordance with customary law. I say this because there are dispute of facts that exist, even though Mr *Madikizela* for the applicant disputes that there are any dispute of facts.

[25] In the alternative, if it can be argued that there was a sum of R62 500 which was for lobola paid by the deceased, the question that arises as to why the amount was paid to the applicant's mother instead of the emissaries or father of the applicant

[26] There is no corroboration or version of the applicant's mother to confirm that the aforesaid amount was for lobola of the applicant paid for by the deceased.

⁴ *Kambule v The Master and Others* 2007 (3) SA 403 (E).

⁵ *Ibid* at 4110-E.

[27] On the other hand if indeed the aforesaid amount was for lobola, such lobola occurred during the subsistence of a civil marriage between the deceased and Mrs A B Zuma which is in contravention to s 10(4) of the Act.

[28] The applicant has also stated that the deceased bought her a ring. It is not clear when it was bought by the deceased save to say that it was bought by the deceased. The onus rests with the applicant to prove that this occurred. However, it is not conclusive that this in fact happened.

[29] It is also uncertain whether emissaries whose names are not mentioned by the applicant, visited the household of the applicant and without clear evidence it is doubtful that indeed such incident happened.

[30] The applicant has failed to comply with s 3(1) of the Act in that, she has failed to convince the court that lobola took place between family and the deceased's family. The only assumption that is common cause is that there was co-habitation between the deceased and the applicant. However, I will only concentrate on the issue of whether there was a valid customary marriage or not between the applicant and the deceased, if so, it could not co-exist with a civil marriage between the deceased and Mrs AB Zuma.

[31] It is therefore my view that even if there was evidence of compliance with section 3(1) of the Act mentioned herein, which is not, such lobola would be unlawful or invalid, due to the existence of the civil marriage as mentioned in paragraph 14 and 22 above.

[32] As stated earlier there were two cases pending. According to Mr *Naidu*, for the Respondents in his supplementary heads of argument, those cases have no bearing to prohibit this court from making an informed determination.

[33] Accordingly, the applicant's application stands to be dismissed.

Order

[34] I therefore make the following order:

1. The application is dismissed with costs.

Gwagwa AJ

APPEARANCE DETAILS:

For the applicant:

Mr S Madikizela

Instructed by:

M Mbatha Attorneys

For the 1st, 2nd and 4th to 7th Respondent:

Mr V Naidu

Instructed by":

Gosai & Co Inc

Matter heard on:

11 October 2023

Judgment delivered on:

21 December 2023