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

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
Case no: **3818/2022**

In the matter between:

B[...] C[...] G[...]

PLAINTIFF

and

S[...] J[...] M[...]

DEFENDANT

CORAM: **MBHELE, DJP**

HEARD ON: 14, 15, 17 AND 24 NOVEMBER 2023

DELIVERED ON: 22 MARCH 2024

JUDGMENT BY: **MBHELE, DJP**

- [1] The plaintiff issued summons against the defendant for divorce. Defendant denies that there was any marriage contract entered into between himself and the plaintiff. In his plea the defendant denies that there was any customary marriage negotiated and entered into between himself and the plaintiff. Of importance is that the existence of the customary marriage is denied on the

basis that there was no lobolo slip (contract) attached to the particulars of claim.

- [2] I am called upon to adjudicate at this stage only whether the plaintiff and the defendant were married to each other in terms of the customary law as it is alleged in the particulars of claim.

- [3] In addition to her testimony the plaintiff called 4 more witnesses in support of her case. B[...] G[...] G[...]’s (plaintiff) evidence was to the following effect: She is Xhosa by birth and got married to the defendant through customary rites. She comes from a family that is steeped in tradition which would have prohibited her from moving in to stay with the defendant without following traditional and customary processes applicable to a marriage. She and the defendant met in 2004 and had a relationship which lasted for a few months. They reconciled in 2005 and in 2007 she fell pregnant. Her family reported her pregnancy to the defendant’s family who confirmed that the child plaintiff was carrying is the defendant’s.

- [4] In 2009 plaintiff caught defendant cheating and when she confronted him the defendant declared his love and made a promise to marry her. On 5 December 2009 emissaries from the defendant’s family arrived at the plaintiff’s home to negotiate lobolo. The plaintiff’s family was represented by Plaintiff’s father, her grandfather Mr. M[...] and T[...] M[...] who is plaintiff’s brother. Defendant ‘s family was represented by F[...] M[...] and A[...] M[...] who were both in court during plaintiff’s testimony.

- [5] A[...] G[...], D[...] M[...], N[...] G[...] and M[...] M[...] were amongst the people who were in the house during lobola negotiations. The lobola was charged at 10 cows calculated at R1000.00 each. She was in a separate room but she could hear the conversation that was happening in the next room because their house had no ceiling making it easy for sound to permeate the whole house. The defendant’s family paid R4000 and promised to come back at a later stage to pay the remaining amount.

- [6] Her father gave a report to her mother in her presence of the lobola negotiations and handed over a written agreement to her mother for safe keeping. The delegation from the defendant's family came back around January 2010 to pay another R4000.00. Around February 2010 the defendant's family wrote a letter to her family asking them to release her to join the M[...]s as their daughter in law (makoti).
- [7] Around March 2010 she was accompanied to the M[...] family by her aunt M[...] and her cousin N[...] M[...]. On her arrival at the defendant's parental home she was taken to the defendant's grandmother's (grandmother) house where her welcome ceremony was held. She drove from defendant's parental home in company of defendant's brother M[...] and his sister D[...]. At the grandmother's house she was made to sit behind the door until a sheep was slaughtered to welcome her into the family.
- [8] They dressed her up in traditional outfit (Seshweshwe and a blanket), gave her the name M[...] with which everybody in the family started calling her. She was then given a piece of meat from a specific part of the slaughtered sheep and told to eat it to initiate her into complete womanhood. A[...] M[...]s wife, M[...], gave a welcome speech and counseled her on how to conduct herself as a makoti in the M[...] family in the presence of the grandmother, defendant's mother and aunts. Defendant's parents, his aunts, uncles and cousins including his grandmother were there when all these rituals were performed. The celebrations and festivities progressed until around 7 pm and people were dancing and singing. Traditional beer, sour milk and other food were served to the attendees.
- [9] The family then released her and the defendant to go and stay together at a house he was renting in Botshabelo. She was given strict instructions to wear the traditional outfit for six months.
- [10] She was not able to attach the Lobolo slips to the summons because they were kept by her mother who has since passed away. The lobolo slips and all the correspondence between her family and the defendant's was kept by her

deceased mother and has since been lost. She searched diligently in her parents' house without success. She stayed together with the defendant for 10 years and participated in all activities and rituals performed at the defendant's family. She was even asked to give a welcoming speech at the wedding of M[...] (defendant's brother) and his wife. He was asked by defendant's uncle G[...] P[...] to give counsel to M[...]’s wife in her capacity as the senior makoti. She at all material times acted as the defendant's wife and even enlisted the defendant as a spouse in her insurance policy.

- [11] They stayed together as husband and wife for 10 years until 2020 when they went separate ways and have been living apart ever since. During the subsistence of their relationship defendant enlisted plaintiff's name as a contact person to in correspondence with his lawyers for his motor vehicle accident claim with the Road Accident Fund. There was a time when they both visited the Family Advocate's office for a dispute relating to access to their minor children. After a consultation with a Mr. Holele he gave them a list of possible lawyers to consult for the purpose of filing a divorce action.

- [12] In 2022 plaintiff heard from M[...]’s wife that defendant was in a process of getting married to someone else. Aggrieved by the turn of events she went to her aunt in Botshabelo to share the news and the latter wrote a letter to the defendant's family requesting the meeting in which the issue of the relationship of plaintiff (M[...]) and the defendant would be discussed. A week later on 26 March 2022 defendant got married to someone else without informing her.

- [13] The next witness was T[...] G[...] M[...], Plaintiff's brother. He confirmed that he was part of the G[...] delegation during lobola negotiations of the plaintiff and the defendant. He, further, confirmed the amount set as lobola price as well as the fact that in March plaintiff was accompanied and handed over as a bride to the defendant's family. The said contract was reduced to writing by A[...] M[...]. Thereafter the emissaries from the defendant's family took out two bottles of alcohol, Bells and Black and White.

- [14] The next witness was M[...] M[...] M[...], plaintiff's aunt, who confirmed that she was present at the plaintiff's parental home when the emissaries from the defendant's family arrived to negotiate lobolo for the plaintiff and defendant on 05 December 2009 when they paid R4000 of the R10 000 charged for lobolo. She remembers that the M[...]s came back again in January 2010 to pay another amount. Sometime in 2022 Plaintiff approached her in Botshabelo to inform her that she came across a wedding invitation of defendant and another woman. She immediately wrote a letter to the M[...]s inviting them to a meeting enquiring about the situation between plaintiff and defendant in the face of the imminent wedding of defendant and another woman. She knows that the M[...]s received the letter because she got a report from the plaintiff that the letter was delivered and further that her sister, D[...], informed her that she received an unpleasant call from defendant remarking about the letter. She received no response thereto as the writer. She later learned that the wedding went ahead the following week.
- [15] The next witness was D[...] M[...] K[...] M[...], plaintiff's aunt. She was informed that the M[...]s would be coming to negotiate lobolo for the plaintiff on 5 December 2009. She could not attend the event because she was at work. She was there on 19 January 2020 when they came for the second time and paid R4000. She was also there when the plaintiff was handed over to the M[...]s. She helped to prepare plaintiff for handing over and dressed her in traditional attire before her departure. She was accompanied by her paternal aunt M[...] and her cousin N[...] (N[...]). Because the G[...] and M[...]s' homes are adjacent each other she watched from her sister's house when the plaintiff arrived at the M[...]s being welcomed by defendant's mother at the gate. After D[...] wrote the letter to the M[...]s requesting a meeting she received a call from the defendant who was very rude and told her they were busy and that there would be no meeting between the two families.
- [16] The last witness for the plaintiff was N[...] N[...] M[...] (nee G[...]). She is plaintiff's cousin. She was part of a delegation that accompanied plaintiff to the M[...] family for hand over. It happened in March 2010. She was with her mother, M[...], who has since passed on. On their arrival at the M[...]s they

were welcomed by the defendant's mother who took them into some room and changed the plaintiff into a new set of traditional outfit. She reiterated that the plaintiff and defendant are married through customary rites.

[17] Defendant denies ever sending emissaries to the plaintiff's family to negotiate lobolo on his behalf. He admits that he stayed together with the plaintiff for 10 years although there were times in which he moved out to stay with other women. When asked how the plaintiff acquired the name M[...] he was at pains to explain that it flows from a pet name he gave her, Afoso. The elders in the family started calling her M[...] in tune with the nickname. He later on denied that there were people in his family who called plaintiff M[...]. When asked why the plaintiff was asked to give counsel to his brother's wife at his brother's traditional wedding he denied that she executed that assignment in her capacity as his wife. He then said actually plaintiff was never asked to counsel his brother's wife, it was him that was asked to speak and he waived that right in favour of plaintiff because he is a shy person. In essence he denied everything that the plaintiff said in her testimony about their traditional wedding for the first time when he took a witness stand. He added, further, that the plaintiff filed for divorce for a non-existing marriage because she is after the money he received as compensation from the Road Accident Fund.

[18] The next witness was A[...] M[...], defendant's cousin. His testimony was shortly to the effect that he was never a part of any delegation that went to the plaintiff's family to negotiate lobolo. He in short says he does not know where the plaintiff's home is nor does he know any of the plaintiff's witnesses that pointed him in court. He saw the plaintiff for the first time after 2020 when he met the defendant and he pointed at plaintiff who was a distance away and said that was the mother of his children.

[19] I am faced with two diametrically opposed versions as to whether there was any *lobolo* negotiations or not. It is well established that when faced with two diametrically opposed versions, the Court has to resolve the factual disputes by making findings on the credibility of the various factual witnesses, their reliability and

probabilities. In *National Employers' General Insurance v Jagers*¹ the following was said:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster KO-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (Supra). I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had, to an estimate of relative credibility apart from the probabilities."

See also *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others*.²

¹ 1984 (4) SA 437 (ECO) at 440D - 441A.

² *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA 11 (SCA) par. 5

[20] We heard for the first time during defendant's case that there was never a handover ceremony held to welcome plaintiff as a bride and that A[...] M[...] saw plaintiff once in his lifetime when defendant pointed her at a distance telling him she was his children's mother. He did not deny that he and his wife M[...] were at the plaintiff's welcome ceremony and that his wife gave word of counsel to plaintiff on how to conduct herself as a *makoti* in the M[...] family. The essential parts of plaintiff's testimony and that of her witnesses were not challenged under cross examination.

[21] In *President of the Republic of South Africa v SARFU 2000 (1) SA 1 (CC)* the Constitutional Court held as follows at paras [61] to [63]:

"[61] As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination, showing that the imputation is intended to be made and to afford the witness an opportunity, whilst still in the witness-box of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's evidence is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

[22] Cross examination is an essential process of any trial. It is an important ingredient in the process of ensuring a right to a fair trial for all parties involved. It affords the opposing party an opportunity to test the evidence of a witness and for such witness to explain and defend their testimony while in the witness box. Failure to challenge disputed evidence during cross examination is a risky exercise because it leaves the court with an uncontroverted version which is difficult to reject.

[23] I have to consider credibility of witnesses, their reliability and weigh the probabilities to determine which version is more probable. I must also consider

whether the incidents testified about are logically possible, true and what the witnesses personally experienced. Plaintiff's account of events stood unchallenged. The evidence tendered on behalf of the plaintiff was straightforward and supported by external material like photos of events where she played a role as defendant's wife. Plaintiff, her aunts, brother and cousin delivered their evidence in a satisfactory manner and gave a clear account of what happened from the time plaintiff fell pregnant until she was officially handed over to M[...] family.

[24] Defendant's testimony was a bare denial. The evidence presented by plaintiff and her witnesses called for explanation which was not proffered by defendant and his witness. His evidence was characterised with a huge number of inconsistent unsubstantiated explanations on pertinent issues. Defendant and his witness had a dismissive attitude and seemed inconvenience about being in court. The defendant was argumentative, evasive and his explanations were made up to suit as and when he was confronted. His witness was obstructive, rude and tried everything to conceal information from the court. Their account of events was untrue and cannot be relied upon.

[25] In terms of section 3 of the **Recognition of Customary Marriages Act 120 of 1998**, a customary marriage entered into after the commencement of the Act will be valid if:

- (i) the prospective spouses are both above the age of 18 years;
- (ii) 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.

[26] The Supreme Court of Appeal dealt with the essential requirements of a valid customary marriage in the matter of **Moropane v Southon (755/12) [2014] ZASCA 76 (29 May 2014)** wherein Bosielo JA said the following:

"[39] Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage among the Bapedi people include amongst others, negotiations between the families in respect of lobola;

a token for opening the negotiations (go kokota or pula molomo); followed by asking for the bride (go kopa sego sa metsi); an agreement on the number of beast payable as lobola (in modern times this is replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (go laiwa) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders.

[40] Importantly, the two experts agreed that the handing over of the makoti to her in-laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family. See *Motsotsoa v Rora & Another and The Current Legal Status of Customary Marriages in South Africa*, IP Maithufi and GBM Moloi, *Journal of SA Law*, 2002, p 599 and Bennett (above) at p217."

[27]] The uncontested evidence of the plaintiff and her witnesses show that there were lobolo negotiations in which a bride price was agreed upon. Negotiations were followed by celebrations at defendant's grandmother's house where plaintiff (bride) was handed over to his family. During the handing over ceremony a sheep was slaughtered and both plaintiff and defendant were given a particular part from the slaughtered sheep as recognition that they are husband and wife and to seal their union. At the defendant's grandmother's house, plaintiff was adorned in traditional clothing and given the name M[...] which symbolised the beginning of married life for her. According to her and her witnesses a new name was given to her as a bride to signify that she is defendant's wife and no longer single. She would be called with her new name by her in-laws and everybody who knew that she was married to defendant.

[28] At the centre of the defendant's case was initially that there was no lobolo slip attached to plaintiff's summons to show that there was indeed lobolo negotiations held. A written lobolo contract is not a sine qua non to a valid customary marriage. Besides, plaintiff gave a clear account of why the contract cannot be traced despite diligent search. With defendant failing to challenge plaintiff's testimony or confronting her and her witnesses with a version contrary to theirs I find no reason to reject the plaintiff's version. Defendant was not even able to explain why plaintiff acquired a new name, M[...]. I am satisfied that the essential requirements of a valid customary

marriage were satisfied and that plaintiff and defendant are indeed married in terms of customary rites with all obligations that fall from such marriage. I see no reason why costs should not follow the event.

[29] I accordingly make the following order:

Order

1. Defendant's special plea is dismissed with costs.

N.M. MBHELE, DJP

Appearances:

For the Plaintiff

Adv. HJ VAN DER MERWE
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For the Defendant:

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